

SUPREME COURT OF INDIA

CIVIL WRIT PETITION 829 / 2013

IN THE MATTER OF:

S.G. VOMBATKERE & ANR.

...PETITIONERS

Versus

UNION OF INDIA & ORS.

...RESPONDENTS

COMPILATION

VOLUME III - A

INDIAN CASE - LAWS

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Submitted on behalf of the Petitioners

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(1955) 2 SCR 225:AIR 1955 SC 549

RAI SAHIB RAM JAWAYA KAPUR AND OTHERS . . Petitioners;

Versus

STATE OF PUNJAB . . Respondent.

(Under Article 32 of the Constitution for the enforcement of fundamental rights).

Petitions Nos. 652 of 1954 and 71 to 77 and 85 of 1955, decided on 12th day of April, 1955.

Present:

THE HON'BLE CHIEF JUSTICE BIJAN KUMAR MUKHERJEA

THE HON'BLE JUSTICE VIVIAN BOSE

THE HON'BLE JUSTICE B. JAGANNADHADAS

THE HON'BLE JUSTICE T.L. VENKATARAMA AYYAR

THE HON'BLE JUSTICE SYED JAFER IMAM

For the Petitioners in 652 of 1954: G.S. Pathak, Senior Advocate (P.N. Mehta and G.C. Mathur, Advocates, with him).

For the Petitioners in 71 to 77 and 85 of 1955: P.N. Mehta and G.C. Mathur, Advocates.

For the Respondent in all Petitions: S.M. Sikri, Advocate-General for the State of Punjab (Jindra Lal and P.G. Gokhale, Advocates, with him).

Petition No. 652 of 1954.

The Judgment of the Court was delivered by

MUKHERJEA, C.J.— This is a petition under Article 32 of the Constitution, preferred by six persons, who purport to carry on the business of preparing, printing, publishing and selling text books for different classes in the schools of Punjab, particularly for the primary and middle classes, under the name and style "Uttar Chand Kapur & Sons". It is alleged that the Education Department of the Punjab Government has in pursuance of their so-called policy of nationalisation of text books, issued a series of notifications since 1950 regarding the printing, publication and sale of these books which have not only placed unwarrantable restrictions upon the rights of the petitioners to carry on their business but have practically ousted them and other fellow-traders from the business altogether. It is said that no restrictions could be imposed upon the petitioners' right to carry on the trade which is guaranteed under Article 19(1)(g) of the Constitution by mere executive orders without proper legislation and that the legislation, if any, must conform to the requirements of clause (6) of Article 19 of the Constitution. Accordingly, the petitioners pray for writs in the nature of mandamus directing the Punjab Government to withdraw the notifications which have affected their rights.

2. To appreciate the contentions that have been raised by the learned counsel who appeared for the parties before us, it will be necessary to narrate certain relevant facts. In the State of Punjab, all recognised schools have got to follow the course of studies approved by the Education Department of the Government and the use, by

the pupils, of the text books prescribed or authorised by the Department is a condition precedent to the granting of recognition to a school. For a long period of time prior to 1950, the method adopted by the Government for selection and approval of text books for recognised schools was commonly known as the alternative method and the procedure followed was shortly this: Books on relevant subjects, in accordance with the principles laid down by the Education Department, were prepared by the publishers with their own money and under their own arrangements and they were submitted for approval of the Government. The Education Department after proper scrutiny selected books numbering between 3 and 10 or even more on each subject as alternative text books, leaving it to the discretion of the Headmasters of the different schools, to select any one of the alternative books on a particular subject out of the approved list. The Government fixed the prices as well as the size and contents of the books and when these things were done it was left to the publishers to print, publish and sell the books to the pupils of different schools according to the choice made by their respective Headmasters. Authors, who were not publishers, could also submit books for approval and if any of their books were approved, they had to make arrangements for publishing the same and usually they used to select some one of the publishers already on the line to do the work.

3. This procedure, which was in vogue since 1905, was altered in material particulars on and from May 1950. By certain resolutions of the Government passed on or about that time, the whole of the territory of Punjab, as it remained in the Indian Union after partition, was divided into three zones. The text books on certain subjects like agriculture, history, social studies etc. for all the zones were prepared and published by the Government without inviting them from the publishers. With respect to the remaining subjects, offers were still invited from "publishers and authors" but the alternative system was given up and only one text book on each subject for each class in a particular zone was selected. Another change introduced at this time was that the Government charged, as royalty, 5% on the sale price of all the approved text books. The result therefore was that the Government at this time practically took upon themselves the monopoly of publishing the textbooks on some of the subjects and with regard to the rest also, they reserved for themselves a certain royalty upon the sale proceeds.

4. Changes of a far more drastic character however were introduced in the year 1952 by a notification of the Education Department issued on the 9th of August, 1952 and it is against this notification that the complaints of the petitioners are mainly directed. This notification omitted the word "publishers" altogether and invited only the "authors and others" to submit books for approval by the Government. These "authors and others", whose books were selected, had to enter into agreements in the form prescribed by the Government and the principal terms of the agreement were that the copyright in these books would vest absolutely in the Government and the "authors and others" would only get a royalty at the rate of 5% on the sale of the text books at the price or prices specified in the list. Thus the publishing, printing and selling of the books were taken by the Government exclusively in their own hands and the private publishers were altogether ousted from this business. The 5% royalty, in substance, represents the price for the sale of the copyright and it is paid to an author or any other person who, not being the author, is the owner of the copyright and is hence competent in law to transfer the same to the Government. It is against these notifications of 1950 and 1952 that the present petition under Article 32 of the Constitution is directed and the petitioners pray for withdrawal of

these notifications on the ground that they contravene the fundamental rights of the petitioners guaranteed under the Constitution.

5. The contentions raised by Mr Pathak, who appeared in support of the petitioners, are of a three-fold character. It is contended in the first place that the executive Government of a State is wholly incompetent, without any legislative sanction, to engage in any trade or business activity and that the acts of the Government in carrying out their policy of establishing monopoly in the business of printing and publishing text books for school students is wholly without jurisdiction and illegal. His second contention is, that assuming that the State could create a monopoly in its favour in respect of a particular trade or business, that could be done not by any executive act but by means of a proper legislation which should conform to the requirements of Article 19(6) of the Constitution. Lastly, it is argued that it was not open to the Government to deprive the petitioners of their interest in any business or undertaking which amounts to property without authority of law and without payment of compensation as is required under Article 31 of the Constitution.

6. The first point raised by Mr Pathak, in substance, amounts to this, that the Government has no power in law to carry on the business of printing or selling text books for the use of school students in competition with private agencies without the sanction of the legislature. It is not argued that the functions of a modern State like the police States of old are confined to mere collection of taxes or maintenance of laws and protection of the realm from external or internal enemies. A modern State is certainly expected to engage in all activities necessary for the promotion of the social and economic welfare of the community. What Mr Pathak says, however, is, that as our Constitution clearly recognises a division of governmental functions into three categories viz. the legislative, the judicial and the executive, the function of the executive cannot but be to execute the laws passed by the legislature or to supervise the enforcement of the same. The legislature must first enact a measure which the executive can then carry out. The learned counsel has, in support of this contention, placed considerable reliance upon Articles 73 and 162 of our Constitution and also upon certain decided authorities of the Australian High Court to which we shall presently refer.

7. Article 73 of the Constitution relates to the executive powers of the Union, while the corresponding provision in regard to the executive powers of a State is contained in Article 162. The provisions of these articles are analogous to those of Sections 8 and 49(2) respectively of the Government of India Act, 1935 and lay down the rule of distribution of executive powers between the Union and the States, following, the same analogy as is provided in regard to the distribution of legislative powers between them. Article 162, with which we are directly concerned in this case, lays down:

"Subject to the provisions of this Constitution, the executive power of a State shall extend to the matters with respect to which the legislature of the State has power to make laws:

Provided that in any matter with respect to which the legislature of a State and Parliament have power to make laws, the executive power of the State shall be subject to, and limited by, the executive power expressly conferred by this Constitution or by any law made by Parliament upon the Union or authorities thereof."

4

Thus under this article the executive authority of the State is exclusive in respect to matters enumerated in List II of Seventh Schedule. The authority also extends to the Concurrent List except as provided in the Constitution itself or in any law passed by Parliament. Similarly, Article 73 provides that the executive powers of the Union shall extend to matters with respect to which Parliament has power to make laws and to the exercise of such rights, authority and jurisdiction as are exercisable by the Government of India by virtue of any treaty or any agreement. The proviso engrafted on clause (1) further lays down that although with regard to the matters in the Concurrent List the executive authority shall be ordinarily left to the State it would be open to Parliament to provide that in exceptional cases the executive power of the Union shall extend to these matters also. Neither of these articles contain any definition as to what the executive function is and what activities would legitimately come within its scope. They are concerned primarily with the distribution of the executive power between the Union on the one hand and the States on the other. They do not mean, as Mr Pathak seems to suggest, that it is only when Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 172 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already. The same principle underlies Article 73 of the Constitution. These provisions of the Constitution therefore do not lend any support to Mr Pathak's contention.

8. The Australian cases upon which reliance has been placed by the learned counsel do not, in our opinion, appear to be of much help either. In the first¹ of these cases, the executive Government of the Commonwealth, during the continuance of the war, entered into a number of agreements with a company which was engaged in the manufacture and sale of wool-tops. The agreements were of different types. By one class of agreements, the Commonwealth Government gave consent to the sale of wool-tops by the company in return for a share of the profits of the transactions (called by the parties "a licence fee"). Another class provided that the business of manufacturing wool-tops should be carried on by the company as agents for the Commonwealth in consideration of the company receiving an annual sum from the Commonwealth. The rest of the agreements were a combination of these two varieties. It was held by a Full Bench of the High Court that apart from any authority conferred by an Act of Parliament or by regulations thereunder, the executive Government of the Commonwealth had no power to make or ratify any of these agreements. The decision, it may be noticed, was based substantially upon the provision of Section 61 of the Australian Constitution which is worded as follows:

"The executive power of the Commonwealth is vested in the Queen and is exercised by the Governor-General as the Queen's representative and extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth."

In addition to this, the King could assign other functions and powers to the Governor-General under Section 2 but in this particular case no assignment of any additional powers was alleged or proved. The court held that the agreements were not directly authorised by Parliament or under the provisions of any statute and as they were not for the execution and maintenance of the Constitution they must be held to be void. Isacs, J., in his judgment, dealt elaborately with the two types of agreements and held that the agreements, so far as they purported to bind the company to pay to

the government money, as the price of consents, amounted to the imposition of a tax and were void without the authority of Parliament. The other kind of agreements which purported to bind the Government to pay to the company a remuneration for manufacturing wool-tops was held to be an appropriation of public revenue and being without legislative authority was also void.

9. It will be apparent that none of the principles indicated above could have any application to the circumstances of the present case. There is no provision in our Constitution corresponding to Section 61 of the Australian Act. The Government has not imposed anything like taxation or licence fee in the present case nor have we been told that the appropriation of public revenue involved in the so-called business in text books carried on by the Government has not been sanctioned by the legislature by proper Appropriation Acts.

10. The other case² is of an altogether different character and arose in the following way. The Commonwealth Government had established a clothing factory in Melbourne for the purpose of making naval and military uniforms for the defence forces and postal employees. In times of peace the operations of the factory included the supply of uniforms for other departments of the Commonwealth and for employees in various public utility services. The Governor-General deemed such peace time operations of the factory necessary for the efficient defence of the Commonwealth inasmuch as the maintenance intact of the trained complement of the factory would assist in meeting wartime demands. A question arose as to whether operations of the factory for such purposes in peace time were authorised by the Defence Act. The majority of the court answered the question in the affirmative. Starke, J. delivered a dissenting opinion upon which Mr Pathak mainly relied. The learned Judge laid stress on Section 61 of the Constitution Act according to which the executive power of the Commonwealth extended to the maintenance of the Constitution and of the laws of the Commonwealth and held that there was nothing in the Constitution or any law of the Commonwealth which enabled the Commonwealth to establish and maintain clothing factories for other than Commonwealth purposes. The opinion, whether right or wrong, turns upon the particular facts of the case and upon the provision of Section 61 of the Australian Act and it cannot and does not throw any light on the question that requires decision in the present case.

11. A question very similar to that in the present case did arise for consideration before a Full Bench of the Allahabad High Court in *Motilal v. Government of the State of Uttar Pradesh*³. The point canvassed there was whether the Government of a State has power under the Constitution to carry on the trade or business of running a bus service in the absence of a legislative enactment authorising the State Government to do so. Different views were expressed by different Judges on this question. Chief Justice Malik was of opinion that in a written Constitution like ours the executive power may be such as is given to the executive or is implied, ancillary or inherent. It must include all powers that may be needed to carry into effect the aims and objects of the Constitution. It must mean more than merely executing the laws. According to the Chief Justice the State has a right to hold and manage its own property and carry on such trade or business as a citizen has the right to carry on, so long as such activity does not encroach upon the rights of others or is not contrary to law. The running of a transport business therefore was not per se outside the ambit of the executive authority of the State. Sapru, J. held that the power to run a Government bus service was incidental to the power of acquiring property which was expressly

conferred by Article 298 of the Constitution. Mootham and Wanchoo, JJ., who delivered a common judgment, were also of the opinion that there was no need for a specific legislative enactment to enable a State Government to run a bus service. In the opinion of these learned Judges an act would be within the executive power of the State if it is not an act which has been assigned by the Constitution of India to other authorities or bodies and is not contrary to the provisions of any law and does not encroach upon the legal rights of any member of the public. Agarwala, J. dissented from the majority view and held that the State Government had no power to run a bus service in the absence of an Act of the legislature authorising the State to do so. The opinion of Agarwala, J. undoubtedly supports the contention of Mr Pathak but it appears to us to be too narrow and unsupportable.

12. It may not be possible to frame an exhaustive definition of what executive function means and implies. Ordinarily the executive power connotes the residue of governmental functions that remain after legislative and judicial functions are taken away. The Indian Constitution has not indeed recognised the doctrine of separation of powers in its absolute rigidity but the functions of the different parts or branches of the Government have been sufficiently differentiated and consequently it can very well be said that our Constitution does not contemplate assumption, by one organ or part of the State, of functions that essentially belong to another. The executive indeed can exercise the powers of departmental or subordinate legislation when such powers are delegated to it by the legislature. It can also, when so empowered, exercise judicial functions in a limited way. The executive Government, however, can never go against the provisions of the Constitution or of any law. This is clear from the provisions of Article 154 of the Constitution but, as we have already stated, it does not follow from this that in order to enable the executive to function there must be a law already in existence and that the powers of the executive are limited merely to the carrying out of these laws.

13. The limits within which the executive Government can function under the Indian Constitution can be ascertained without much difficulty by reference to the form of the executive which our Constitution has set up. Our Constitution, though federal in its structure, is modelled on the British parliamentary system where the executive is deemed to have the primary responsibility for the formulation of governmental policy and its transmission into law though the condition precedent to the exercise of this responsibility is its retaining the confidence of the legislative branch of the State. The executive function comprises both the determination of the policy as well as carrying it into execution. This evidently includes the initiation of legislation, the maintenance of order, the promotion of social and economic welfare, the direction of foreign policy, in fact the carrying on or supervision of the general administration of the State.

14. In India, as in England, the executive has to act subject to the control of the legislature; but in what way is this control exercised by the legislature? Under Article 53(1) of our Constitution, the executive power of the Union is vested in the President but under Article 75 there is to be a Council of Ministers with the Prime Minister at the head to aid and advise the President in the exercise of his functions. The President has thus been made a formal or constitutional head of the executive and the real executive powers are vested in the Ministers or the Cabinet. The same provisions obtain in regard to the Government of States; the Governor or the Rajpramukh, as the case may be, occupies the position of the head of the executive in the State but it is virtually the Council of Ministers in each State that carries on

the executive Government. In the Indian Constitution, therefore, we have the same system of parliamentary executive as in England and the Council of Ministers consisting, as it does, of the members of the legislature is, like the British Cabinet, "a hyphen which joins, a buckle which fastens the legislative part of the State to the executive part". The Cabinet enjoying, as it does, a majority in the legislature concentrates in itself the virtual control of both legislative and executive functions; and as the Ministers constituting the Cabinet are presumably agreed on fundamentals and act on the principle of collective responsibility, the most important questions of policy are all formulated by them.

15. Suppose now that the Ministry or the executive Government of a State formulates a particular policy in furtherance of which they want to start a trade or business. Is it necessary that there must be a specific legislation legalising such trade activities before they could be embarked upon? We cannot say that such legislation is always necessary. If the trade or business involves expenditure of funds, it is certainly required that Parliament should authorise such expenditure either directly or under the provisions of a statute. What is generally done in such cases is, that the sums required for carrying on the business are entered in the annual financial statement which the Ministry has to lay before the house or houses of legislature in respect of every financial year under Article 202 of the Constitution. So much of the estimates as relate to expenditure other than those charged on the consolidated fund are submitted in the form of demands for grants to the legislature and the legislature has the power to assent or refuse to assent to any such demand or assent to a demand subject to reduction of the amount (Article 203). After the grant is sanctioned, an appropriation bill is introduced to provide for the appropriation out of the consolidated fund of the State of all moneys required to meet the grants thus made by the assembly (Article 204). As soon as the appropriation Act is passed, the expenditure made under the heads covered by it would be deemed to be properly authorised by law under Article 266(3) of the Constitution.

16. It may be, as Mr Pathak contends, that the appropriation Acts are no substitute for specific legislation and that they validate only the expenses out of the consolidated funds for the particular years for which they are passed; but nothing more than that may be necessary for carrying on of the trade or business. Under Article 266(3) of the Constitution no moneys out of the consolidated funds of India or the consolidated fund of a State shall be appropriated except in accordance with law and for the purposes and in the manner provided in this Constitution. The expression "law" here obviously includes the appropriation Acts. It is true that the appropriation Acts cannot be said to give a direct legislative sanction to the trade activities themselves. But so long as the trade activities are carried on in pursuance of the policy which the executive Government has formulated with the tacit support of the majority in the legislature, no objection on the score of their not being sanctioned by specific legislative provision can possibly be raised. Objections could be raised only in regard to the expenditure of public funds for carrying on of the trade or business and to these the appropriation Acts would afford a complete answer.

17. Specific legislation may indeed be necessary if the Government require certain powers in addition to what they possess under ordinary law in order to carry on the particular trade or business. Thus when it is necessary to encroach upon private rights in order to enable the Government to carry on their business, a specific

legislation sanctioning such course would have to be passed.

18. In the present case it is not disputed that the entire expenses necessary for carrying on the business of printing and publishing the text books for recognised schools in Punjab were estimated and shown in the annual financial statement and that the demands for grants, which were made under different heads, were sanctioned by the State Legislature and due appropriation Acts were passed. For the purpose of carrying on the business the Government do not require any additional powers and whatever is necessary for their purpose, they can have by entering into contracts with authors and other people. This power of contract is expressly vested in the Government under Article 298 of the Constitution. In these circumstances, we are unable to agree with Mr Pathak that the carrying on of the business of printing and publishing text books was beyond the competence of the executive Government without a specific legislation sanctioning such course.

19. These discussions however are to some extent academic and are not sufficient by themselves to dispose of the petitioners' case. As we have said already, the executive Government are bound to conform not only to the law of the land but also to the provisions of the Constitution. The Indian Constitution is a written Constitution and even the legislature cannot override the fundamental rights guaranteed by it to the citizens. Consequently, even if the acts of the executive are deemed to be sanctioned by the legislature, yet they can be declared to be void and inoperative if they infringe any of the fundamental rights of the petitioners guaranteed under Part III of the Constitution. On the other hand, even if the acts of the executive are illegal in the sense that they are not warranted by law, but no fundamental rights of the petitioners have been infringed thereby, the latter would obviously have no right to complain under Article 32 of the Constitution though they may have remedies elsewhere if other heads of rights are infringed. The material question for consideration therefore is: What fundamental rights of the petitioners, if any, have been violated by the notifications and acts of the executive Government of Punjab undertaken by them in furtherance of their policy of nationalisation of the text books for the school students?

20. The petitioners claim fundamental right under Article 19(1)(g) of the Constitution which guarantees, inter alia, to all persons the right to carry on any trade or business. The business which the petitioners have been carrying on is that of printing and publishing books for sale including text books used in the primary and middle classes of the schools in Punjab. Ordinarily it is for the school authorities to prescribe the text books that are to be used by the students and if these text books are available in the market the pupils can purchase them from any book-seller they like. There is no fundamental right in the publishers that any of the books printed and published by them should be prescribed as text books by the school authorities or if they are once accepted as text books they cannot be stopped or discontinued in future. With regard to the schools which are recognised by the Government the position of the publishers is still worse. The recognised schools receive aids of various kinds from the Government including grants for the maintenance of the institutions, for equipment, furniture, scholarships and other things and the pupils of the recognised schools are admitted to the school final examinations at lower rates of fees than those demanded from the students of non-recognised schools. Under the school code, one of the main conditions upon which recognition is granted by Government is that the school authorities must use as text books only those which are prescribed or authorised by the Government. So far

therefore as the recognised schools are concerned — and we are concerned only with these schools in the present case the choice of text books rests entirely with the Government and it is for the Government to decide in which way the selection of these text books is to be made. The procedure hitherto followed was that the Government used to invite publishers and authors to submit their books for examination and approval by the Education Department and after selection was made by the Government, the size, contents as well as the prices of the books were fixed and it was left to the publishers or authors to print and publish them and offer them for sale to the pupils. So long as this system was in vogue the only right which publishers, like the petitioners had, was to offer their books for inspection and approval by the Government. They had no right to insist on any of their books being accepted as text books. So the utmost that could be said is that there was merely a chance or prospect of any or some of their books being approved as text books by the Government. Such chances are incidental to all trades and businesses and there is no fundamental right guaranteeing them. A trader might be lucky in securing a particular market for his goods but if he loses that field because the particular customers for some reason or other do not choose to buy goods from him, it is not open to him to say that it was his fundamental right to have his old customers for ever. On the one hand, therefore, there was nothing but a chance or prospect which the publishers had of having their books approved by the Government, on the other hand the Government had the undisputed right to adopt any method of selection they liked and if they ultimately decided that after approving the text books they would purchase the copyright in them from the authors and others provided the latter were willing to transfer the same to the Government on certain terms, we fail to see what right of the publishers to carry on their trade or business is affected by it. Nobody is taking away the publishers' right to print and publish any books they like and to offer them for sale but if they have no right that their books should be approved as text books by the Government it is immaterial so far as they are concerned whether the Government approves of text books submitted by other persons who are willing to sell their copyrights in the books to them, or choose to engage authors for the purpose of preparing the text books which they take up on themselves to print and publish. We are unable to appreciate the argument of Mr Pathak that the Government while exercising their undoubted right of approval cannot attach to it a condition which has no bearing on the purpose for which the approval is made. We fail to see how the petitioners' position is in any way improved thereby. The action of the Government may be good or bad. It may be criticised and condemned in the houses of the legislature or outside but this does not amount to an infraction of the fundamental right guaranteed by Article 19(1)(g) of the Constitution.

21. As in our view the petitioners have no fundamental right in the present case which can be said to have been infringed by the action of the Government, the petition is bound to fail on that ground. This being the position, the other two points raised by Mr Pathak do not require consideration at all. As the petitioners have no fundamental right under Article 19(1)(g) of the Constitution, the question whether the Government could establish a monopoly without any legislation under Article 19(6) of the Constitution is altogether immaterial. Again a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest in an undertaking within the meaning of Article 31(2) of the Constitution and no question of payment of compensation can arise because the petitioners have been deprived of the same. The result is that the petition is dismissed with costs.

Petition No. 71 of 1955.

SHRI MAN MOHAN KAPUR OF SUNRISE PUBLISHERS, CHAWRI
BAZAR, DELHI . . Petitioner;

Versus

STATE OF PUNJAB . . Respondent.

Petition No. 72 of 1955.

SHRI VISHWA NATH MALHOTRA & ANOTHER OF RAJPAL &
SONS, PUBLISHERS, DELHI . . Petitioner;

Versus

STATE OF PUNJAB . . Respondent.

Petition No. 73 of 1955.

SANT GOKAL CHAND OF ORIENTAL BOOK DEPOT, PUBLISHERS,
NAI SARAK, DELHI . . Petitioners;

Versus

STATE OF PUNJAB . . Respondent.

Petition No. 74 of 1955.

SHRI GOWARDHAN DAS KAPUR & 3 OTHERS OF GULAB CHAND
KAPUR & SONS, DELHI . . Petitioners;

Versus

STATE OF PUNJAB . . Respondent.

Petition No. 75 of 1955.

SHRI RAM LAL SURI KARTA OF UNDIVIDED HINDU JOINT
FAMILY OF RAM LAL SURI & SONS, AMBALA CANTT . .
Petitioner;

Versus

STATE OF PUNJAB . . Respondent.

Petition No. 76 of 1955.

S. JIWAN SINGH OF LAHORE BOOK SHOP, LUDHIANA . .
Petitioners;

Versus

STATE OF PUNJAB . Respondent.

Petition No. 77 of 1955.

MAN MOHAN KAPUR OF M/S GURDAS KAPUR & OTHERS . .
Petitioners;

Versus

STATE OF PUNJAB . . Respondent.

Petition No. 85 of 1955.

SHRI O.P. GHAI & OTHERS OF UNIVERSITY PUBLISHERS,
JULLUNDUR . . Petitioners;

Versus

STATE OF PUNJAB . . Respondent.

MUKHERJEA, C.J.— These 8 petitions under Article 32 of the Constitution raise identically the same points for consideration as are involved in Petition No. 652 of 1954 just disposed of. The petitioners in these cases also purport to be printers,

publishers and sellers of text-books for various classes in the schools of Punjab and they complain of infraction of their fundamental rights under Article 19(1)(g) of the Constitution by reason of the various notifications issued by the State of Punjab in pursuance of their policy of nationalisation of text books. The learned counsel appearing in these cases have adopted in their entirety the arguments that have been advanced by Mr Pathak in Petition No. 652 of 1954 and no fresh or additional argument has been put forward by any one of them. This being the position the decision in Petition No. 652 of 1954 will govern these petitions also and they will stand dismissed but we would make no order as to costs.

¹ Commntmonwwealth and the Central Wool Committee v. Colonial Combing, Spinning and Weaving Co Ltd., 31 CLR 421

² Vide Attorney-General for Victoria v. Commonwealth 52 CLR 533

³ AIR 1951 Allahabad 257

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1959 Supp (1) SCR 528: AIR 1959 SC 149: (1959) 35 ITR 190

Appeal by Special Leave from the Order dated the 29th January 1958 of the Commissioner of Income Tax, Delhi & Rajasthan at New Delhi under Section 8-A (2) of the Taxation on Income (Investigation Commission) Act, 1947.

BASHESHA NATH. . . Appellant;

Versus

COMMISSIONER OF INCOME TAX DELHI & RAJASTHAN AND
ANOTHER. . . Respondents.

MODEL KNITTING INDUSTRIES LTD. ... Interveners.

Civil Appeal No. 208 of 1958, decided on 19th day of November, 1958.

Present:

THE HON'BLE THE CHIEF JUSTICE SUDHI RANJAN DAS.

THE HON'BLE JUSTICE N. H. BHAGWATI.

THE HON'BLE JUSTICE SUDHANSHU KUMAR DAS.

THE HON'BLE JUSTICE J. L. KAPUR.

THE HON'BLE JUSTICE K. SUBBA RAO.

For the Appellant: Harnam Singh, Senior Advocate (Sadhu Singh, Advocate, with him).

For the Respondents: M.C. Setalvad, Attorney-General for India, C.K. Daphtary, Solicitor-General of India and B. Sen, Senior Advocate (R.H. Dhebar, Advocate, with them).

For the Interveners: A. C. Mitra and B. P. Maheshwari, Advocates.

The Judgments of the Court were delivered by

DAS, C.J.— This appeal by special leave filed by one Shri Besheshar Nath hereinafter referred to as "the assessee" calls in question the validity of a settlement made under Section 8-A of the Taxation on Income (Investigation Commission) Act, 1947 (30 of 1947), hereinafter referred to as "the Investigation Act". This Act, which came into force on May 1, 1947, by a notification issued by the Central Government under Section (1)(3) thereof, has had a short but chequered career, as will appear from the facts hereinafter stated.

2. In order to appreciate the several questions canvassed before us it is necessary to refer to the provisions of the impugned Act. Section 3 authorised the Central Government to constitute an Income Tax Investigation Commission (hereinafter called the Commission) and imposed on it the following duties:

"(a) to investigate and report to the Central Government on all matters relating to taxation on income, with particular reference to the extent to which the existing law relating to, and procedure for, the assessment and collection of such taxation is adequate to prevent the evasion thereof;

(b) to investigate in accordance with the provisions of this Act any case or points in

a case referred to it under Section 5 and make a report thereon (including such interim reports as the Commission may think fit) to the Central Government in respect of all or any of the assessments made in relation to the case before the date of its report or interim report, as the case may be."

We may skip over Section 4 which dealt with the composition of the Commission. Section 5, which is of importance was as follows:

"5. (1) The Central Government may at any time before 30th day of June 1948 refer to the Commission for investigation and report any case or points in a case in which the Central Government has prima facie reasons for believing that a person has to a substantial extent evaded payment of taxation on income, together with such material as may be available in support of such belief, and may at any time before 30th day of June 1948 apply to the Commission for the withdrawal of any case or points in a case thus referred, and if the Commission approves of the withdrawal, no further proceedings shall thereafter be taken by or before the Commission in respect of the case or points so withdrawn.

(2) The Commission may, after examining the material submitted by the Central Government with reference to any case or points in a case and making such investigation as it considers necessary, report to the Central Government that in its opinion further investigation is not likely to reveal any substantial evasion of taxation on income and on such report being made the investigation shall be deemed to be closed.

(3) No reference made by the Central Government under sub-section (1), at any time before 30th day of June, 1948 shall be called in question, nor shall the sufficiency of the material on which such a reference has been made be investigated in any manner by any court.

(4) If in the course of investigation into any case or points in a case referred to it under sub-section (1), the Commission has reason to believe—

(a) that some person other than the person whose case is being investigated has evaded payment of taxation on income, or

(b) that some points other than those referred to it by the Central Government in respect of any case also require investigation,

it may make a report to the Central Government stating its reasons for such belief and, on receipt of such report, the Central Government shall, notwithstanding anything contained in sub-section (1), forthwith refer to the Commission for investigation the case of such other person or such additional points as may be indicated in that report."

The date "30th day of June, 1948" appearing in sub-sections (1) and (3) was, by Act 49 of 1948, substituted by the words "1st day of September, 1948". Section 6 set out the various powers conferred on the Commission and Section 7 prescribed the procedure of the Commission. It is not necessary to set out the various powers and the details of the procedure in extenso and it will suffice to say that they have been considered by this Court and pronounced to be much more drastic and harsh than the powers to be exercised and the procedure to be followed by the Income Tax Authorities acting under the provisions of the Indian Income Tax Act, 1922. The

relevant portions of Section 8 ran as follows:

"8. (1) Save as otherwise provided in this Act, the materials brought on record shall be considered by all the three members of the Commission sitting together and the report of the Commission shall be in accordance with the opinion of the majority.

(2) After considering the report, the Central Government shall by order in writing direct that such proceedings as it thinks fit under the Indian Income Tax Act, 1922, the Excess Profits Tax Act, 1940 or any other law, shall be taken against the person to whose case the report relates in respect of the income of any period commencing after 31st day of December 1938; and, upon such a direction being given, such proceedings may be taken and completed under the appropriate law notwithstanding the restrictions contained in Section 34 of the Indian Income Tax Act, 1922, or Section 15 of the Excess Profits Tax Act, 1940, or any other law and notwithstanding any lapse of time or any decision to a different effect given in the case by any Income tax authority or Income Tax Appellate Tribunal.

(3) * * *

(4) In all assessment or re-assessment proceedings taken in pursuance of a direction under sub-section (2), the findings recorded by the Commission on the case or on the points referred to it shall, subject to the provisions of sub-sections (5) and (6), be final; but no proceedings taken in pursuance of such direction shall be a bar to the initiation of proceedings under Section 34 of the Indian Income Tax Act, 1922.

(5)-(6) * * *

(7) Notwithstanding anything to the contrary contained in this Act or in any other law, for the time being in force, any evidence in the case admitted before the Commission or an authorised official shall be admissible in evidence in any proceedings directed to be taken under sub-section (2).

(8) * * *

Section 9 barred the jurisdiction of courts to call in question any act or proceeding of the Commission or any authorised official appointed under Section 6. Section 10 gave power to the Central Government to make rules by notification in the Official Gazette.

3. On July 22, 1948, the case of the assessee was referred to the Commission in the following terms:

"Ministry of Finance (Revenue Division) New Delhi, 22nd July, 1948.

Under Section 5(1) of the Taxation on Income (Investigation Commission) Act, 1947, the cases of the following persons are hereby referred to the Investigation Commission for investigation and report, as the Central Government has prima facie reasons for believing that each such person has either alone or in combination with the other persons mentioned below, evaded payment of taxation on income to a substantial extent. The material available in support of such belief accompanies.

No.

Name

E.P. 829/1

Beshashar Nath and Co.

829/2

Lala Beshashar Nath,

sd/-

Pyare Lal,

Deputy Secretary,

Ministry of Finance

(Revenue Division).

The Secretary, Income Tax,

Investigation Commission,

New Delhi."

It is not necessary to set out the annexures that accompanied this order. It Appears that the total wealth statement of the assessee was filed on November 10, 1948, and was forwarded to the authorised official. It also appears that from January 8, 1949 to October 14, 1949 the authorised official was engaged in the collection of assessment records of the assessee from the territorial income tax offices and of materials from the Civil Supplies Directorate regarding the assessee. In the meantime by Section 33 of Act 67 of 1949 the following section was inserted in the Act as Section 8-A:

"8-A. *Settlement of cases under investigation.*—(1) Where any person concerned in any case referred to or pending before the Commission for investigation applies to the Commission at any time during such investigation to have the case or any part thereof settled insofar as it relates to him, the Commission shall, if it is of opinion that the terms of the settlement contained in the application may be approved, refer the matter to the Central Government, and if the Central Government accepts the terms of such settlement, the Commission shall have the terms thereof recorded and thereupon the investigation, insofar as it relates to matters covered by such settlement, shall be deemed to be closed.

(2) For the purpose of enforcing the terms of any settlement arrived at in pursuance of sub-section (1), the Central Government may direct that such proceedings as may be appropriate under the Indian Income Tax Act, 1922 (11 of 1922), the Excess Profits Tax Act, 1940 (15 of 1940) or any other law may be taken against the person

to whom the settlement relates, and in particular the provisions of the second proviso to clause (a) of sub-section (5) of Section 23, Section 24B, the proviso to sub-section 2 of Section 25-A, the proviso to sub-section 2 of Section 26 and Sections 44 and 46 of the Indian Income Tax Act, 1922 shall be applicable to the recovery of any sum specified in such settlement by the Income Tax Officer having jurisdiction to assess the person by whom such sum is payable as if it were income tax or an arrear of income tax within the meaning of those provisions.

(3) Subject to the provisions of sub-section (6) of Section 8, any settlement arrived at under this section shall be conclusive as to the matters stated therein, and no person whose case has been so settled be entitled to reopen in any proceeding for the recovery of any sum under this section or in any subsequent assessment or reassessment proceeding relating to taxation on income or in any other proceeding before any court or other authority any matter which forms part of such settlement,

(4) Where a settlement has been accepted by Government under sub-section (1), no proceedings under Section 34 of the Indian Income Tax Act, 1922 (XI of 1922) or under Section 15 of the Excess Profits Tax Act, 1940 (XV of 1940) shall be initiated in respect of the items of income covered by the settlement, unless the initiation of such proceedings is expressly allowed by the terms of the settlement."

On July 5, 1949, the total wealth statement was received back from the authorised official. Our Constitution came into force on January 26, 1950. The order-sheet shows that the authorised official on May 26, 1950, issued a notice to the assessee fixing the hearing for June 10, 1950, which indicates that the authorised official was proceeding with the investigation set in motion by the reference of the assessee's case to the Commission. The assessee appears to have attended on June 6, 1950, with an application for extension of time which apparently was given. On September 30, 1950, the assessee supplied certain statements of his firm. The entry in the order-sheet against the date October 31, 1950, shows that the assessee asked for further extension of time. There appears to be a hiatus of about 3 years and evidently nothing was done until June 9, 1953, when the authorised official fixed the hearing of the case on June 15, 1953. The authorised official submitted his interim report to the Commission on June 9, 1953. The assessee was examined on October 9, 10 and 13, 1953, and the authorised official submitted his final report on October 19, 1953. On January 30, 1954, notice was issued to the assessee to appear before the Commission on February 15, 1954. Presumably to get ready for the hearing the assessee, on February 5, 1954, asked for inspection of certain assessment orders concerning his case, for the return of his lease deed filed by him and a copy of the statement of one L. Kalidas and for production of certain documents before the Commission. The hearing, which had been fixed for February 15, 1954, was adjourned till March 4, 1954. Witness Kalidas was examined on March 4, 1954. On March 29, 1954, the assessee asked for a copy of the deposition given by the witness Durgadas before the Commission. After the evidence was closed notice was issued to the assessee on May 1, 1954, asking him to appear before the Commission on May 19, 1954. On that date the assessee attended, arguments were heard and orders were reserved. Learned counsel for the assessee states that at the close of the arguments on May 19, 1954, the Commission announced its view that the income, profits and gains that had escaped assessment in the hands of the assessee for the period beginning with April 1, 1939, and ending March 31, 1947, were the sum of Rs 4,47,915, that the Commission also threw a hint that should the assessee accept the said finding he would be granted the benefit of a settlement on the lower

concessional basis of payment of 75% and a small penalty of Rs 14,064 and that in the circumstances the assessee had no other alternative than to make the best of the bad job by proposing a settlement under Section 8-A offering to pay Rs 3,50,000 by way of tax and penalty. This sequence of events is amply borne out by paras 3 and 4 of the settlement application filed by the assessee on May 20, 1954, a copy of which has been produced before us by the respondents. The Commission on May 24, 1954, made a report under Section 8-A(1) to the Central Government that it was of opinion that the terms of settlement contained in the application might be approved. The Central Government having accepted the proposed settlement, the Commission had the terms thereof recorded. The Central Government by its Order C No. 74(9-IT) 54 made on July 5, 1954, under Section 8-A(2) of the Investigation Act directed that demand notice in accordance with the said terms be served immediately by the Income Tax Officer and that all such other proceedings under the Indian Income Tax Act or other law as may be necessary be taken with a view to enforce the payment of the demand and that the entire sum of Rs 3,50,000 be demanded in one sum. It appears, however, that the assessee was allowed to make payments by instalments of Rs 5000, per month.

4. In the meantime on May 28, 1954, this Court delivered judgment in *Suraj Mall Mohta and Co. v. A.V. Visvanatha Sastri*¹. In that case in the course of investigation of the case of Messrs. Jute and Gunny Brokers Ltd. which had been referred to the Commission under Section 5(1) of the Investigation Act, it was alleged to have been discovered by the Commission that Suraj Mall Mohta and Co. had made large profits which they had not disclosed and had thus evaded taxation. A report to that effect having been made on August 28, 1953, by the Commission to the Central Government under Section 5(4) of the Investigation Act the Central Government on September 9, 1953, referred the case against Suraj Mall Mohta and Co. to the Commission under the provisions of Section 5 (4). On September 15, 1953, the Commission notified Suraj Mall Mohta and Co. that their cases had been referred for investigation and called upon them to furnish certain materials, details of which were set out in annexure to the petition. On April 12, 1954, Suraj Mall Mohta and Co. filed a petition under Article 32 of the Constitution asking for an appropriate writ restraining the Commission from taking any action on the ground that the provisions of the Investigation Act had become void being discriminatory in character. By that judgment this Court held that both Section 34 of the Indian Income Tax Act, 1922 as it then stood, and sub-section (4) of Section 5 of the Investigation Act dealt with persons who had similar characteristics of being persons who had not truly disclosed their income and had evaded payment of tax on their income but that as the procedure prescribed by the Investigation Act was substantially more prejudicial than the procedure under the Indian Income Tax Act, 1922, sub-section (4) of Section 5 and the procedure prescribed by the Investigation Act, insofar as it affected persons proceeded against under that sub-section was a piece of discriminatory legislation which offended the provisions of Article 14 of the Constitution and was, therefore, void and unenforceable.

5. Sub-section (4) of Section 5 of the Investigation Act having been declared void, Parliament passed the Indian Income Tax Amendment Act (33 of 1954) amending Section 34 of the Indian Income Tax Act, 1922. Paradoxical as it may seem, the result of this amendment was that persons who originally fell only within the ambit of Section 5(1) of the Investigation Act and formed a distinct class of substantial tax evaders also came within the amended Section 34 of the Indian Income Tax Act, 1922. The position after the amendment, therefore, was that the Income Tax

Officers could pick out some of these persons and refer their cases under Section 5 (1) of the Investigation Act and thereby subject them to the drastic and harsh procedure of that Act, while they could deal with other persons similarly situate under Section 34 as amended and apply to them the comparatively more beneficial procedure laid down in the Indian Income Tax Act, 1922. Promptly several applications were made under Article 32 of the Constitution complaining that after the amendment of Section 34 of the Indian Income Tax Act, Section 5(1) of the Investigation Act became discriminatory in that the persons falling within it could be dealt with under the drastic, prejudicial and harsh procedure prescribed by the Investigation Act, while other persons similarly situate and belonging to the same category could at the whim or pleasure of the Income Tax Authorities be proceeded against under the more beneficial procedure prescribed under the Indian Income Tax Act. All those applications were disposed of by a common judgment reported as *Shree Meenakshi Mills Ltd. v. Sri A.V. Visvanatha Sastri*². This Court held that Section 34 of the Income Tax Act, as amended by the Indian Income Tax Amendment Act, 1954 (33 of 1954), operated on the same field as Section 5(1) of the Investigation Act, and, therefore, Section 5(1) had become void and unenforceable as the procedure applied to persons dealt with thereunder became discriminatory in character. It should be noted that in none of those petitions disposed of by that judgment had any assessment been made under the Investigation Act and this Court only prohibited further proceedings before the Commission under the Investigation Act. The assessee-appellant now before us who had entered into a settlement under Section 8 of the Investigation Act and had been assessed in accordance with the terms of the settlement continued to pay the tax by monthly instalments of Rs 5000 as before.

6. Finally on December 20, 1955, came the decision of this Court in *M.C.T. Muthiah v. CIT*³. In that case the Central Government had under Section 5(1) of the Investigation Act referred the case to the Commission. The Commission after holding an enquiry recorded its findings and held that an aggregate sum of Rs 10,07,322-4-3 represented the undisclosed income during the period under investigation. The Commission having submitted its report to the Central Government, the latter acting under Section 8(2) of the Investigation Act directed that appropriate action under the Indian Income Tax Act, 1922 be taken against that assessee with a view to assess or re-assess the income which had escaped assessment for the period 1940-41 to 1948-49. The Income Tax Officer accordingly issued notices and made the re-assessment for the years 1940-41, 1941-42 and 1943-44 to 1948-49 based upon the finding of the Commission, which was treated as final and conclusive. These assessment orders were served on that assessee. There was, however, no re-assessment order for the year 1942-43. In regard to the assessment orders which had been served the assessee concerned applied to the Commissioner of Income Tax under Section 8(5) of the Investigation Act for reference to the High Court on questions of law arising out of those re-assessment orders. During the pendency of those proceedings the assessee, in that case on December 6, 1954, filed a petition contending that the provisions of the Investigation Act were illegal, ultra vires and unconstitutional. The majority of this Court held that different persons, though falling under the same class or category of substantial evaders of income tax, were being subjected to different procedures, one a summary and drastic procedure and the other the normal procedure which gave to the assessee various rights which were denied to those who were specially treated under the Procedure prescribed by the Investigation Act and, therefore, the assessments made under Section 8(2) were void and unenforceable. That was a case of assessment under Section 8(2) in

invitum after an investigation under the Investigation Act. The assessee-appellant before us, who had at the end of the investigation entered into a settlement and been assessed in accordance with the terms of such settlement, however, went on making payments in discharge of the balance due under the terms of settlement right up to September 8, 1957, when he made the last payment of Rs 8000 bringing the aggregate payment up to Rs 1,28,000.

7. In the meantime the Income Tax Officer had sent a certificate requesting the Collector of Delhi for the recovery of the balance due by the assessee under the settlement. In execution of that certificate some of the properties belonging to the assessee situated in Dharamsalla and Hissar were attached. On December 27, 1957, the assessee made an application to the Income Tax Commissioner. After pointing out that between July 5, 1954, and December 27, 1957, the petitioner had paid in all Rs 1,28,000 towards the discharge of his liability under the settlement and referring to the decisions of this Court in *Suraj Mall Mohta's case*¹ and *Muthia's case*³ the assessee submitted that the settlement under Section 8-A of the Investigation Act had no force and did not bind the petitioner and that the settlement had been made under the pressure of the situation and in view of the coercive machinery of the Investigation Act and that from either point of view the settlement was not binding. His contention was that when Section 5(1) of the Investigation Act had been held unconstitutional the settlement under Section 8-A could not be enforced, for the foundation of the proceedings under Section 8-A was the reference under Section 5(1) and the foundation having crumbled down the superstructure must fall with it. Under the circumstances the assessee submitted that the attached properties be released and the amount already recovered under the settlement be refunded. On January 29, 1958 the Income Tax Commissioner sent the following communication to the assessee:

No. L-228(1)/54-55/17590

Office of the Commissioner of Income Tax, Delhi and Rajasthan, New Delhi.

Dated, New Delhi 29th January, 1958.

Shri Besheshar Nath,

9, Barakhamba Road,

New Delhi.

Dear Sir,

Sub: Taxation on Income (Investigation Commission) Act, 1947— Order u/s 8-A(2) — Your petition dated 27th December, 1957. With reference to your petition dated 27th December, 1957 regarding the settlement arrived at under Section 8-A(2) of the Taxation on Income (Investigation Commission) Act, 1947. I am to inform you that the settlement is valid and binding on you.

2. You are, therefore, requested to make good arrears of instalments which you have not paid recently by 5th February, 1958 and also to continue making the payments in accordance with the instalments scheme agreed to, failing which the recovery proceedings will be vigorously pursued through the usual recovery channels.

Yours faithfully,

sd/-

S.K. Gupta,

Commissioner of Income Tax,

Delhi & Rajasthan, New Delhi.

Being aggrieved by the above decision the assessee thereupon moved this Court and obtained special leave to appeal against that order. The appeal has now come up for final disposal before us.

8. It may be mentioned here that as the respondents are anxious to have the matters of controversy raised in this appeal decided and set at rest by a decision of this Court, the respondents, for the purposes of this appeal, have not insisted on their objection that an appeal does not lie under Article 136 of the Constitution against an order of the Commissioner of Income Tax. Learned counsel for the assessee also has not pressed his claim for refund of the amounts already paid and has pressed the appeal regarding the balance that remains to be paid under the settlement which is characterised as invalid. Model Knitting Industries Ltd. which has a case pending in the High Court of Calcutta where the same questions as are in issue in the appeal before us, are also in issue has been permitted to intervene and we have heard counsel appearing for that intervenor.

9. In view of the three decisions referred to above learned Attorney-General does not seriously contend that the powers conferred on the Commissioner by Section 6 and the procedure laid down by Section 7 of the Investigation Act are not discriminatory, but what he urges is that none of the said decisions has held that Section 5(1) is wholly void and inoperative. He says that Section 5(1) only authorises the Central Government to refer certain cases to the Commission. Upon such a reference two lines of procedure are clearly indicated by the Investigation Act, namely, (1) that an investigation may be held in invitum following the procedure prescribed and exercising the powers conferred by the Investigation Act and (2) that a settlement may be made under Section 8-A. If the first procedure is followed and an assessment is made under Section 8(2) such assessment will undoubtedly be invalid as has been held in *Muthiah case*³, but if on a case being referred the settlement procedure is followed then the consequential order of assessment under Section 8-A cannot be questioned. We are unable to accept this line of argument as permissible in view of the provisions of the Investigation Act. It will be recalled that when the case of the assessee was referred to the Commission under Section 5(1) on July 22, 1948, there was no provision for settlement in the Act at all. Therefore, that reference, when it was made, consigned the assessee to the only procedure of investigation that was then prescribed by the Act. In the next place it should be remembered that after Section 8-A was added in the Investigation Act by Section 33 of Act 67 of 1949 an authorised official was appointed under Section 6(3) to investigate the affairs of the assessee and to examine the books and to interrogate any person or obtain any statement from any person and under sub-section (4) the authorised official was empowered to exercise the same powers as had been vested in the Commission under sub-sections (1) and (2) of Section 6. Further, by its own terms Section 8-A made it clear that the person concerned in any case referred to the Commission for investigation might apply to the Commission *at any time during such investigation* to have the case settled. Therefore this provision for settlement

was an integral part of the entire investigation procedure. It was not a separate or independent procedure apart from the investigation procedure. It is true that there was nothing to prevent the assessee from straightaway making a proposal for settlement before any actual step towards investigation was taken by the Income Tax Authorities, but before the Commission could refer the proposal for settlement to the Central Government it had to be satisfied that the terms of settlement contained in the application were such as might be approved. For the purpose of satisfying itself the Commission had obviously to go into the facts either by itself or through an authorised official and to consider the materials collected by the authorised official and in the process of doing so had to hold an investigation of some sort and that investigation had necessarily to be made in accordance with the procedure prescribed by the Investigation Act itself. It is, therefore, not correct to say that there could be a proceeding for settlement without any investigation at all. In our opinion Section 8-A did not provide for a separate procedure at all. When a case was referred under Section 5(1) it was really for investigation and a settlement was something which could crop up in the process of that investigation just as in the course of a suit parties may arrive at some compromise. In recording the compromise and passing a judgment in accordance with the compromise thereof, the court exercises the same jurisdiction as it exercises in entertaining and disposing of the suit itself. Likewise in entertaining a proposal for settlement the Commission exercised its jurisdiction of investigation under Section 5, followed the procedure prescribed by Section 7 and exercised all its powers under Section 6. As already stated the language of Section 8-A itself shows that a settlement can be proposed only *during such investigation*. In our judgment, therefore, the contention of the learned Attorney-General that the Investigation Act prescribed two procedures is not well founded.

10. Learned Attorney-General then points out that the Investigation Act was a pre-Constitution Act and that before the commencement of the Constitution when there was no such thing as a fundamental right, its provisions could not be questioned however discriminatory the procedure may have been. He urges that after the commencement of the Constitution the assessee has not been subjected to the coercive procedure laid down by the Investigation Act, but voluntarily proposed a settlement which was accepted by the Central Government on the recommendation of the Commission. In that situation he was in the same position as Qasim Razvi had been in and the observations to be found in the judgment of Mukherjea, J. who delivered the majority judgment in *Syed Qasim Razvi v. State of Hyderabad case*¹, applied to the present appeal. We do not think it is necessary, for the purpose of this appeal, to go minutely into the facts of *Qasim Razvi case*¹ with reference to which the observations relied on had been made, or to analyse the correctness of the reasoning adopted in that case, for that can only be done by a larger Bench. We are definitely of opinion, however, that the observations made in the majority judgment should not be extended but must be kept strictly confined to the special facts of that case. In our judgment those observations have no application to the facts of the present appeal before us, for here even after the commencement of the Constitution, the process of investigation continued in that the authorised official went on collecting materials by following the procedure prescribed by Section 7 and exercising the powers conferred on him by Section 6 of the Investigation Act.

11. The last argument advanced by the learned Attorney-General is that if there had been a breach of the assessee's fundamental right by subjecting him to a discriminatory procedure laid down in the Investigation Act, the assessee, by

voluntarily entering into a settlement, must be taken to have waived such breach and cannot now be permitted to set up his fundamental right. Immediately two questions arise for consideration, namely, (1) whether the assessee could waive the breach of the fundamental right in question and (2) whether in the facts and circumstances of this case he had actually done so.

Re (1)

12. In *Behram Khurshed Pesikaka v. State of Bombay*⁵ there was general discussion whether a fundamental right could be waived. At p. 638 Venkatarama Aiyar, J. observed:

"The question is, what is the legal effect of a statute being declared unconstitutional. The answer to it depends on two considerations,— firstly, does the constitutional prohibition which has been infringed affect the competence of the legislature to enact the law or does it merely operate as a check on the exercise of a power which is within its competence; and secondly, if it is merely a check, whether it is enacted for the benefit of individuals or whether it is imposed for the benefit of the general public on grounds of public policy. If the statute is beyond the competence of the legislature, as for example, when a State enacts a law which is within the exclusive competence of the Union, it would be a nullity. That would also be the position when a limitation is imposed on the legislative power in the interests of the public, as, for instance, the provisions in Chapter XIII of the Constitution relating to inter-State trade and commerce. But when the law is within the competence of the legislature and the unconstitutionality arises by reason of its repugnancy to provisions enacted for the benefit of individuals, it is not a nullity but is merely unenforceable. Such an unconstitutionality can be waived and in that case the law becomes enforceable. In America this principle is well settled. (Vide *Cooley on Constitutional Limitations*, Vol. I, pp. 368 to 371; *Willis on Constitutional Law* at pp. 524, 531, 542 and 558; *Rottschaefer on Constitutional Law* at pp. 28 and 29-30)."

After referring to three decisions of the American Supreme Court which are also now relied on by the learned Attorney-General, the learned Judge concluded as follows:

"The position must be the same under our Constitution when a law contravenes a prescription intended for the benefit of individuals. The rights guaranteed under Article 19(1)(f) are enacted for the benefit of owners of properties and when a law is found to infringe that provision, it is open to any person whose rights have been infringed to waive it and when there is waiver there is no legal impediment to the enforcement of the law. It would be otherwise if the statute was a nullity; in which case it can neither be waived nor enforced. If then the law is merely unenforceable and can take effect when waived it cannot be treated as non est and as effaced out of the statute book. It is scarcely necessary to add that the question of waiver is relevant to the present controversy not as bearing on any issue of fact arising for determination in this case but as showing the nature of the right declared under Article 19(1)(f) and the effect in law of a statute contravening it."

When the case came up before the Court on review Mahajan, C.J., with the concurrence of Mukherjea, Vivian Bose, and Ghulam Hassan, JJ. said at p. 653:

"In our opinion, the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter. No inference in deciding the case should

have been raised on the basis of such a theory. The learned Attorney-General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the articles, inter alia, Articles 15(1), 20, 21 makes the proposition quite plain. A citizen cannot get discrimination by telling the State "You can discriminate", or get convicted by waiving the protection given under Articles 20 and 21."

On that occasion one of us preferred not to express any opinion on this subject and said at p. 670:

"In coming to the conclusion that I have, I have in a large measure found myself in agreement with the views of Venkatarama Aiyar, J. on that part of the case. I, however, desire to guard myself against being understood to agree with the rest of the observations to be found in his judgment, particularly those relating to waiver of unconstitutionality, the fundamental rights being a mere check on legislative power or the effect of the declaration under Article 13(1) being "relatively void". On those topics I prefer to express no opinion on this occasion."

It will, however, be noticed that the observations of the learned Judges made in that case did not relate to the waiver of a breach of the fundamental right under Article 14.

13. The fundamental right, the breach whereof is complained of by the assessee, is founded on Article 14 of the Constitution. The problem, therefore, before us is whether a breach of the fundamental right flowing from Article 14 can be waived. For disposing of this appeal it is not necessary for us to consider whether any of the other fundamental rights enshrined in Part III of our Constitution can or cannot be waived. We take the view that this Court should not make any pronouncement on any question which is not strictly necessary for the disposal of the particular case before it. We, therefore, confine our attention to Article 14 and proceed to discuss the question on that footing.

14. Article 14 runs as follows:—

"The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

It is the first of the five articles grouped together under the heading "Right to Equality". The underlying object of this article is undoubtedly to secure to all persons, citizens or non-citizens, the equality of status and of opportunity referred to in the glorious Preamble of our Constitution. It combines the English doctrine of the rule of law and the equal protection clause of the 14th Amendment to the American

Federal Constitution which enjoins that no State shall "deny to any person within its jurisdiction the equal protection of the laws". There can, therefore, be no doubt or dispute that this article is founded on a sound public policy recognised and valued in all civilised States. Coming then to the language of the article it must be noted, first and foremost that this article is, in form, an admonition addressed to the State and does not directly purport to confer any right on any person as some of the other articles e.g. Article 19, do. The obligation thus imposed on the State, no doubt, enures for the benefit of all persons, for, as a necessary result of the operation of this article, they all enjoy equality before the law. That is, however, the indirect, though necessary and inevitable, result of the mandate. The command of the article is directed to the State and the reality of the obligation thus imposed on the State is the measure of the fundamental right which every person within the territory of India is to enjoy. The next thing to notice is that the benefit of this article is not limited to citizens, but is available to any person within the territory of India. In the third place it is to be observed that, by virtue of Article 12, "the State" which is, by Article 14, forbidden to discriminate between persons includes the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India. Article 14, therefore, is an injunction to both the legislative as well as the executive organs of the State and the other subordinate authorities. As regards the legislative organ of the State, the fundamental right is further consolidated and protected by the provisions of Article 13. Clause (1) of that article provides that all laws in force in the territories of India immediately before the commencement of the Constitution, insofar as they are inconsistent with the provisions of Part III shall, to the extent of the inconsistency be void. Likewise clause (2) of this article prohibits the State from making any law which takes away or abridges the rights conferred by the same Part and follows it up by saying that any law made in contravention of this clause shall, to the extent of the contravention, be void. It will be observed that, so far as this article is concerned, there is no relaxation of the restriction imposed by it such as there are in some of the other articles e.g. Article 19 clauses (2) to (6). Our right to equality before the law is thus completely and without any exception secured from all legislative discrimination. It is not necessary, for the purpose of this appeal to consider whether an executive order is a "law" within the meaning of Article 13, for even without the aid of Article 13 our right to the equal protection of the law is protected against the vagaries, if any, of the executive Government also. In this connection the observations of Lord Atkin in *Eshugbayi Eleko v. Officer Administering the Government of Nigeria*⁶ are apposite. Said His Lordship at p. 670 that in accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except when he can support the legality of his act before a court of justice. That apart, the very language of Article 14 of the Constitution expressly directs that "the State", which by Article 12 includes the executive organ, shall not deny to any person equality before the law or the equal protection of the law. Thus Article 14 protects us from both legislative and executive tyranny by way of discrimination.

15. Such being the true intent and effect of Article 14 the question arises, can a breach of the obligation imposed on the State be waived by any person? In the face of such an unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a person tells the State that it may do so? If the Constitution asks the State as to why the State did not carry out its behest, will it be

any answer for the State to make that "true, you directed me not to deny any person equality before the law, but this person said that I could do so, for he had no objection to my doing it". I do not think the State will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as was that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It seems to us absolutely clear, on the language of Article 14 that it is a command issued by the Constitution to the State as a matter of public policy with a view to implement its object of ensuring the equality of status and opportunity which every welfare State, such as India, is by her Constitution expected to do and no person can, by any act or conduct, relieve the State of the solemn obligation imposed on it by the Constitution. Whatever breach of other fundamental right a person or a citizen may or may not waive, he cannot certainly give up or waive a breach of the fundamental right that is indirectly conferred on him by this constitutional mandate directed to the State.

16. The learned Attorney-General has relied on various passages in textbooks written by well known and eminent writers e.g. Cooley, Willoughby, Willis and Rottschaefer and on eight American decisions. In considering the statements of law made by American writers and Judges the following observations of Patanjali Sastri, C.J. in *State of Travancore-Cochin v. Bombay Co. Ltd.*² should constantly be borne in mind:

"These clauses are widely different in language, scope and purpose and a varying body of doctrines and tests have grown around them interpreting, extending or restricting, from time to time, their operation and application in the context of the expanding American commerce and industry, and we are of opinion that not much help can be derived from them in the solution of the problems arising under Article 286 of the Indian Constitution."

(See also *State of Bombay v. R.M.D. Chamarbaugwala*⁸.) The American authorities cited by the Attorney-General relate to waiver of obligations under a contract, of the deprivation of right to property without due process of law or of the constitutional right to trial by jury and the like. They have no bearing on the question of the waiver of the equal protection clause of the 14th Amendment which, like our Article 14, is a mandate to the State. It is significant that no American decision is forthcoming which upholds the waiver of the breach of that clause. When a case of breach of any of the fundamental rights akin to what are dealt with in the American authorities will come before us it will, then be the time for us to discuss those authorities and to consider their applicability in the matter of the interpretation of the corresponding provisions of our Constitution. For the moment we prefer to confine our observations to a consideration of waiver of the breach of the fundamental right under Article 14.

17. Learned Attorney-General has relied on three decisions of this Court: (1) *Laxmanappa Hanumantappa Jamkhandi v. Union of India*⁹, (2) *Dewan Bahadur Seth Gopal Das Mohta v. Union of India*¹⁰ and (3) *Baburao Narayanrao Sanas v. Union of India*¹¹ in support of his thesis that a breach of Article 14 may well be waived by a person. In none of those cases, all of which were disposed of on the same day (October 21, 1954) was the question of waiver specifically or seriously discussed. As learned counsel appearing for the intervener points out, the first of the above mentioned cases proceeded on the footing that as Article 265 was not a fundamental right conferred by Part III, it could not be enforced under Article 32. Learned counsel

for the intervener further submitted that the decision in the 2nd case mentioned above could also be explained on that basis and on the further ground that proceeding under Article 32 was not intended to be used for obtaining relief against the voluntary action of a person and that appropriate remedy for recovery of money lay in a suit. The decision in the 3rd case proceeded on the same basis and did not carry the matter any further. It is impossible to treat any of those decisions as representing the considered opinion of this Court on the question of waiver of a breach of the fundamental right under Article 14 of the Constitution. Reference was also made by the learned Attorney-General to the decision of a Single Judge of the Allahabad High Court in *Subedar v. State*¹² where it was held that Article 20(3) conferred merely a privilege and that such privilege could always be waived. It was overlooked that if a person voluntarily answered any question then there was no breach of his fundamental right at all, for the fundamental right is that a person shall not be compelled to incriminate himself. That case, therefore, is not a case of waiver at all. The case of *Pakhar Singh v. State*¹³ is also, for the same reason, not a case of waiver.

Re (2)

18. The answer to this question depends upon facts which have not been properly investigated. The appeal is against the order of the Income Tax Authorities which order makes no reference to the plea of waiver. Further the filing of the statements of case having been dispensed with, we have not had the benefit of the statement of facts on which this plea is said to be founded. The view taken on Question (1), however, relieves us of the necessity of going into this question.

19. On a consideration of the nature of the fundamental right flowing from Article 14, we have no doubt in our mind that it is not for a citizen or any other person who benefits by reason of its provisions to waive any breach of the obligation on the part of the State. We are, therefore, of the opinion that this appeal should be accepted, the order of the Income Tax Commissioner Delhi dated January 29, 1958 should be set aside and all proceedings now pending for implementation of the order of the Union Government dated July 5, 1954 should be quashed and that the assessee-appellant should get the costs of this appeal.

BHAGWATI, J.— I agree with the reasoning adopted and the conclusion reached in the judgments prepared by My Lord the Chief Justice and my Brother S.K. Das, J. in regard to the ultra vires character of the proceedings adopted under Section 8-A of the Taxation on Income (Investigation Commission) Act 1947 (30 of 1947) and the void character of the settlement reached thereunder. As regards the parts of the judgments which deal with the question whether a fundamental right guaranteed by the Constitution can be waived at all, I find myself in agreement with the judgment prepared by my Brother Subba Rao, J. and am of the opinion that it is not open to a citizen to waive the fundamental rights conferred by Part III of the Constitution.

2. The question of waiver came to be argued before us in this way. If the proceedings and the settlement under Section 8-A of the Act were void as aforesaid, the respondent contended that the appellant had waived the fundamental right enshrined in Article 14 of the Constitution and was therefore not entitled to challenge the settlement. This was only by way of reply to the contention of the appellant and was not set out in proper details in any affidavit filed on behalf of the

respondent. The learned Attorney-General, however, relied upon the application made by the appellant before the Investigation Commission and the contents thereof as also the payments made by the appellant from time to time both before and after the pronouncement of our decision in *M.Ct. Muthiah v. CIT*¹⁴ in order to support this plea of waiver and the arguments before us proceeded on that basis. No objection was taken by either of the parties before us to the issue of waiver being decided on such materials and the question was argued at considerable length before us. The arguments moreover extended to the whole field of fundamental rights and were not confined to Article 14 only. We, therefore, see no reason why we should refrain from pronouncing our opinion on that question.

3. The Preamble to our Constitution, Article 13 and the language in which the fundamental rights have been enacted lead to one conclusion and one conclusion only that whatever be the position in America, no distinction can be drawn here, as has been attempted in the United States of America, between the fundamental rights which may be said to have been enacted for the benefit of the individual and those enacted in public interest or on grounds of public policy. Ours is a nascent democracy and situated as we are, socially, economically, educationally and politically, it is the sacred duty of the Supreme Court to safeguard the fundamental rights which have been for the first time enacted in Part III of our Constitution. The limitations on those rights have been enacted in the Constitution itself e.g. in Articles 19, 33 and 34. But unless and until we find the limitations on such fundamental rights enacted in the very provisions of the Constitution, there is no justification whatever for importing any notions from the United States of America or the authority of cases decided by the Supreme Court there in order to whittle down the plenitude of the fundamental rights enshrined in Part III of our Constitution.

4. The genesis of the declaration of fundamental rights in our Constitution can be traced to the following passage from the Report of the Nehru Committee (1928):

"Canada, Australia and South Africa have no declaration of rights in their Constitutions but there are various articles to be found in the Constitution of the Irish Free State which may properly be grouped under the general head "fundamental rights". The reason for this is not far to seek. Ireland is the only country where the conditions obtaining before the treaty were the nearest approach to those we have in India. The first concern of the people of Ireland was, as indeed it is of the people of India today, to secure fundamental rights that have been denied to them. The other dominions had their rise from earlier British settlements which were supposed to have carried the law of England with them. Ireland was taken and kept under the rule of England against her own will and the acquisition of dominion status by her became a matter of treaty between the two nations. We conceive that the constitutional position in India is very much the same. That India is a dependency of Great Britain cannot be denied. That position can be altered in one of two ways — force or mutual consent. It is the latter in furtherance of which we are called upon to recommend the principles of a Constitution for India. In doing so it is obvious that our first care should be to have our fundamental rights guaranteed in a manner *which will not permit their withdrawal under any circumstances.*"

5. At the Round Table Conference that preceded the making of the Government of India Act, 1935, therefore, the Indian leaders pressed for a Bill of Rights in the proposed Constitution Act, in order to bind the administration with certain declarations of individual rights. This was, however, rejected by the Simon

Commission with these observations:

"We are aware that such provisions have been inserted in many Constitutions, notably in those of the European States formed after the war. Experience, however, has not shown them to be of any great practical value. Abstract declarations are useless unless there exist the will and means to make them effective."

6. The framers of our Constitution however followed the American view represented by the famous words of Jefferson in preference to that expressed by the Simon Commission:

"The inconveniences of the declaration are, that it may cramp Government in its useful exertions. But the evil of this is short-lived, moderate and reparable. The inconveniences of the want of a declaration are permanent, afflictive and irreparable. They are in constant progression from bad to worse. The executive in our Governments is not the sole, it is scarcely the principal object of my jealousy. The tyranny of the legislatures is the most formidable dread..." (Vide *Basu's Commentary on the Constitution of India*, Vol. 1, p. 74.)

and incorporated the fundamental rights in Part III of our Constitution.

7. The object sought to be achieved was as the Preamble to the Constitution states "to secure to all its citizens: JUSTICE, social, economic and political; LIBERTY of status and of opportunity; and to promote among them all FRATERNITY assuring the dignity of the individual and the unity of the Nation": and Article 13 provided:

"13. (1) All laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void...."

"Laws in force" were defined in Article 13(3) to include:

"Laws passed or made by a legislature or other competent authority in the territory of India before the commencement of this Constitution and not previously repealed, notwithstanding that any such law or any part thereof may not be then in operation either at all or in particular areas."

and they were declared void, insofar as they were inconsistent with the provisions of this Part, to the extent of such inconsistency. As regards laws to be enacted after the commencement of the Constitution, the State, in the wider significance of the term as including "the Government and Parliament of India and the Government and the legislature of each of the States and all local or other authorities within the territory of India or under the control of the Government of India" (vide Article 12) was enjoined not to make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause was to the extent of the contravention declared void. It will be seen that the prohibition was thus effective both against past laws as well as future laws and both were equally void insofar as they were "inconsistent with" or in "derogation of" the fundamental rights enshrined in Part III of the Constitution. No distinction was made between the past laws and future laws in this respect and they were declared void to the extent of the

inconsistency or the extent of the contravention as the case may be, leaving the unoffending parts thereof untouched.

8. It will be also seen that under Article 13(2) an admonition was administered to the State not to enact any law which takes away or abridges the rights conferred by this Part and the obligation thus imposed on the State enured for the benefit of all citizens of Bharat alike in respect of all the fundamental rights enacted in Part III of the Constitution. No distinction was made in terms between the fundamental rights said to have been enacted for the benefit of the individual and those enacted in the public interest or on grounds of public policy.

9. The question then arises whether a breach of the obligation thus imposed on the State can be waived by a citizen. To borrow the words of my Lord the Chief Justice "In the face of such unequivocal admonition administered by the Constitution, which is the supreme law of the land, is it open to the State to disobey the constitutional mandate merely because a citizen told the State that it may do so? If the Constitution asks the State as to why the State did not carry out its behest, will it be any answer for the State to make that "True, you directed me not to take away or abridge the rights conferred by this Part, but this citizen said that I could do so, for he had no objection to my doing so". I do not think the State will be in any better position than the position in which Adam found himself when God asked him as to why he had eaten the forbidden fruit and the State's above answer will be as futile as that of Adam who pleaded that the woman had tempted him and so he ate the forbidden fruit. It is absolutely clear on a perusal of Article 13(2) of the Constitution that it is a constitutional mandate to the State and no citizen can by any act or conduct relieve the State of the solemn obligation imposed on it by Article 13(2) and no distinction can be made at all between the fundamental rights enacted for the benefit of the individual and those enacted in the public interest or on grounds of public policy.

10. What then is the basis of this distinction which has been strenuously urged before us that there are certain fundamental rights which are enacted only for the private benefit of a citizen e.g. rights of property, which can be waived by him and there are other fundamental rights enacted for the public good or as a matter of public policy which it would not be open to a citizen to waive even though he were affected by the breach thereof. Reliance is placed in this behalf on certain decisions of the Supreme Court of the United States of America, passages from Willoughby, Willis and Rottschaeffer quoted in the judgment of T.L. Venkatarama Aiyar, J. in *Behram Khurshed Peskaka v. State of Bombay*¹⁵ and the observations of the said learned Judge in that case adopting the said distinction. (Vide pp. 638-43 of the report.) I am afraid this distinction cannot be accepted. There is nothing in the terms of the various articles embodying the fundamental rights in Part III of our Constitution which warrants such a distinction. The fundamental rights are enacted with all precision and wherever limitations on their exercise are thought of they are also similarly enacted. Such constitutional limitations are to be found within the terms of the articles themselves and there is no justification for reading in the terms of the articles anything more than what is expressly stated therein. There is further this distinction between the American Constitution and ours that whereas the American Constitution was merely enacted in order to form a more perfect union, establish justice, insure domestic tranquillity, provide for common defence, promote the general welfare and secure the blessings of liberty and was an outline of Government and nothing more, our Constitution was enacted to secure to all

citizens, Justice, Liberty, Equality and Fraternity and laid emphasis on the welfare State and contained more detailed provisions, defining the rights and also laying down restrictions thereupon in the interests of the general welfare etc. As observed by Willis in his *Constitutional Law* at p. 477:

"The conflict between man and the State is as old as human history. For this reason some compromise must be struck between private liberty and public authority. There is some need of protecting personal liberty against governmental power and also some need of limiting personal liberty by governmental power. The ideal situation is a matter of balancing one against the other, or adjusting conflicting interests."

"In the United States Constitution an attempt has been made to strike a proper balance between personal liberty and social control through express limitations written into the Constitution and interpreted by the Supreme Court, by implied limitations created by the Supreme Court, and by the development of the governmental powers of regulation, taxation, and eminent domain by the Supreme Court." (Ibid pp. 477-78),

whereas our Constitution has expressly sought to strike the balance between a written guarantee of individual rights and the collective interests of the community by making express provisions in that behalf in Part III of the Constitution. (Vide *Gopalan v. State of Madras*)¹⁶.

11. Moreover in the matter of considering the statements of law made by the text book writers in America and the dicta of the Judges of the Supreme Court there in the various decisions cited before us, we must bear in mind the following admonition of Patanjali Sastri, C.J. in the *State of Travancore-Cochin v. The Bombay Co., Ltd.*¹⁷

"These clauses are widely different in language, scope and purpose, and a varying body of doctrines and tests have grown around them interpreting, extending or restricting, from time to time, their operation and application in the context of the expanding American commerce and industry, and we are of opinion that not much help can be derived from them in the solution of the problems arising under Article 286 of the Indian Constitution."

or for the matter of that, articles embodying the fundamental rights in Part III of our Constitution (See also *State of Bombay v. R.M.D. Chamarbaugwala*)¹⁸.

12. The rights conferred on citizens may be thus classified: (i) statutory rights; (ii) constitutional rights; and (iii) fundamental rights. One need not consider the statutory rights in this context but the constitutional rights are those created and conferred by the Constitution. They may or may not be waived by a citizen, as stated in the text books and the decisions of the Supreme Court of the United States of America above referred to. But when the rights conferred are put on a high pedestal and are given the status of fundamental rights, which though embodied in the Constitution itself are in express terms distinguished from the other constitutional rights (e.g. fundamental rights which are enshrined in Part III of the Constitution and are enacted as immune from any legislation inconsistent with or derogatory thereto and other constitutional rights which are enacted in other provisions, for instance in Articles 265 and 286 and in Part XIII of the Constitution), they are absolutely inviolable save as expressly enacted in the Constitution and cannot be waived by a citizen. The Constitution adopted by our founding fathers is sacrosanct

and it is not permissible to tinker with those fundamental rights by any ratiocination or analogy of the decisions of the Supreme Court of the United States of America. The only manner in which that can be done is by appropriate amendment of the Constitution and in no other manner whatever.

13. There is no difficulty whatever in working out this position and to my mind the difficulties pointed out are more imaginary than real. If a citizen wanted to assert his fundamental right under the circumstances envisaged for instance in the judgment of my Brother S.K. Das, J. and made an application for a writ under Article 32 or Article 226 of the Constitution he would be promptly confronted with the argument that the court should in the exercise of its discretion refuse him the relief prayed for. The remedy is purely discretionary and no court in those circumstances would exercise its discretion in his favour (vide *Dewan Bahadur Seth Gopal Das Mohta v. Union of India*¹⁹, *Baburao Narayan Savas v. Union of India*²⁰ and *Laxmanappa Hoonmantappa Janakhandi v. Union of India*²¹). Even then he might merely obtain a relief declaring the legislation ultra vires the Constitution and the court would not grant him any consequential relief. For that relief he would have to approach the regular courts of law, when all questions of law, apart from the mere constitutionality of the provision would be considered by the court on a contest between the parties e.g. estoppel, acquiescence, limitation and the like (compare our observations in *Sales Tax Officer v. Kanayalal Mukundlal Sara*²²). The only thing which parties would be concluded by would be the adjudication as to the ultra vires character of the measure in question and the citizen would not be entitled to the relief claimed merely for the asking. These considerations therefore do not militate against the position that a citizen cannot waive the fundamental rights conferred upon him by Part III of the Constitution.

14. I fully endorse the opinion expressed by Mahajan, C.J. in *Behram Khurshheed Pesikaka v. State of Bombay*² at page 653:

"We think that the rights described as fundamental rights are a necessary consequence of the declaration in the preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy."

15. This, in my opinion, is the true position and it cannot therefore be urged that it is open to a citizen to waive his fundamental rights conferred by Part III of the Constitution. The Supreme Court is the bulwark of the fundamental rights which have been for the first time enacted in the Constitution and it would be a sacrilege to whittle down those rights in the manner attempted to be done.

16. The result is however the same and I agree with the order proposed by my Lord the Chief Justice.

S.K. DAS, J.— This is an appeal by special leave from an order dated January 29, 1958, passed by the Commissioner of Income Tax, Delhi, Respondent 1 before us, in circumstances which are somewhat unusual and out of the ordinary. We shall presently relate those circumstances; but at the very outset it may be stated that two questions of far-reaching importance fall for consideration in this appeal. One is the validity of a settlement made under Section 8-A of the Taxation on Income (Investigation Commission) Act, 1947 (30 of 1947) hereinafter referred to as the Act, after the coming into force of the Constitution on January 26, 1950, and the second is if a fundamental right guaranteed by the Constitution can be said to have been waived by the appellant in the circumstances of this case.

18. The appellant before us is Basheshar Nath, whom we shall hereafter call the assessee. As we have already stated, the Commissioner of Income Tax, Delhi, is the first respondent. The second respondent is the Union of India. We also allowed the Model Knitting Industries, a limited liability company with its registered office in Calcutta, to intervene in the appeal, on the ground that the intervening Company has a case pending in the High Court of Calcutta where the same questions are in issue. We have also heard the intervener in support of the appeal.

19. On behalf of the appellant it has been contended that the Commissioner of Income Tax, Delhi, is a tribunal within the meaning of Article 136 of the Constitution and exercised judicial functions when it passed the impugned order of January 29, 1958. The respondents pointed out, however, that the so-called order was nothing but a reply which Respondent 1 gave to a communication received from the assessee. However, the respondents have waived any preliminary objection to the maintainability of the present appeal, and the learned Attorney-General appearing for the respondents has frankly stated before us that he is raising no such preliminary objection, as the Union Government is equally anxious to have a decision on the question, very important from its point of view and with far-reaching financial consequences, as to whether a settlement made under Section 8-A of the Act after January 26, 1950, and the orders passed thereon by the Union Government are valid. We have, therefore, proceeded on the footing that the present appeal is competent, and have considered it unnecessary to decide in the abstract the more general question as to the circumstances in which an order made by a Revenue Authority like the Commissioner of Income Tax partakes of the character of a judicial or quasi-judicial order.

20. Now, for the facts and circumstances which have led up to this appeal. The Act received the assent of the Governor-General on April 18, 1947, and came into force on May 1, 1947. On July 22, 1948, the case of the assessee was referred to the Investigation Commission, constituted under Section 3 of the Act. The reference was made under Section 5(1) of the Act, and it stated that the Central Government had prima facie reasons for believing that the assessee either alone or in combination with other persons evaded payment of taxation on income to a substantial extent, and therefore the case of the assessee was sent to the Investigation Commission for investigation and report. The period of investigation was from April 1, 1939 to March 31, 1947. The report of the Investigation Commission which has been made available to us shows that the case against the assessee was that he carried on a business of supplying tents, executing contract works, and commission agency for some textile mills on a fairly extensive scale, both individually and in partnership with his brother. It appears that the total wealth statement of the assessee was filed on November 10, 1948, and was forwarded to an authorised official appointed under

Section 6(3) of the Act. From January 8, 1949 to October 14, 1949 the authorized official was engaged in the collection of assessment records of the assessee from the Income Tax Authorities and of materials from the Civil Supplies Directorate. On July 5, 1949, the total wealth statement was received back from the assessee and the order-sheet shows that May 26, 1950, (that is, after the coming into force of the Constitution) the authorised official issued a notice to the assessee fixing the hearing for June 10, 1950. The assessee then asked for time, and it appears that for a period of about three years till June, 1953, nothing was done. Thereafter, the authorised official held a preliminary investigation and computed initially that the undisclosed income of the assessee for the period in question was Rs 12,07,000; on further scrutiny and examination of accounts and after hearing the assessee's explanation, the authorised official reduced the amount in his final report, submitted sometime towards the end of 1953, to Rs 9,56,345. The Investigation Commission considered the report of the authorised official, heard the assessee, and came to the conclusion that the total amount to be assessed in the hands of the assessee was Rs 4,47,915. In their report dated May 24, 1954 the Investigation Commission said:

"During the course of the hearing before us, the assessee as well as his auditors applied for a settlement after admitting liability for the aforesaid sum. In the circumstances, we consider it proper to allow the assessee the benefit of a settlement on the lower concessional basis of 75% of evaded income payable by way of tax and a moderate penalty of Rs 14,064.... The assessee accepting our findings both as regards the amount of income that escaped assessment and the amount of tax and penalty payable, offered a settlement. In the circumstances, we recommend the acceptance by the Government of the assessee's offer of a settlement."

The Central Government accepted the settlement under Section 8-A of the Act and on July 5, 1954, passed an order under Section 8-A(2) directing the issue of a demand notice by the Income Tax Officer concerned for a sum of Rs 3,50,000 (including the penalty of Rs 14,064) on the assessee and further directing that "all such other proceedings under the Indian Income Tax Act or under any other law, as may be necessary, should be taken with a view to enforcing the payment of the demand and the terms and conditions of settlement". Though under the terms of settlement no instalments were given, it appears that the assessee was allowed to pay the amount at the rate of Rs 5000 per month. It further appears that up to and including September 8, 1957, the assessee had paid in all a sum of Rs 1,28,000 towards the demands. In December, 1955 was given the decision of this Court in *M.C.T. Muthiah v. CIT*²³, in which the majority of Judges held that Section 5(1) of the Act was ultra vires the Constitution, as it was discriminatory and violative of the fundamental right guaranteed by Article 14 of the Constitution by reason of two amendments which were made in Section 34 of the Indian Income Tax Act, 1922 — one in 1948 by the enactment of the Income Tax and Business Profits Tax (Amendment) Act, 1948 (48 of 1948) and the other in 1954 by the enactment of the Indian Income Tax (Amendment) Act, 1954 (33 of 1954). Sometime earlier than the aforesaid decision, the Income Tax Officer concerned had sent a recovery certificate to the Collector, New Delhi and the assessee stated that in execution of the said certificate his properties situated in Dharamsala and Hissar were attached. On December 27, 1957, the assessee filed a petition to the Income Tax Commissioner, Delhi, in which after stating the relevant facts, the assessee claimed that, after the decision in *Muthiah case*¹, the settlement made under Section 8-A of the Act had no force and was not binding on him: the assessee then prayed that the attached properties should be released from attachment and the amounts recovered under

the terms of settlement refunded to him. On January 29, 1958, the Commissioner of Income Tax sent the following reply—

"With reference to your petition dated 27th December 1957 regarding the settlement arrived at under Section 8-A(2) of the Taxation on Income (Investigation Commission) Act, 1947, I am to inform you that the settlement is valid and binding on you.

2. You are, therefore, requested to make good the arrears of instalments which you have not paid recently by 5th February, 1958 and also to continue making the payments in accordance with the instalments' scheme agreed to, failing which the recovery proceedings will be vigorously pursued through the usual recovery channels."

The assessee asked for and obtained special leave from this Court on February 17, 1958, to appeal from the aforesaid order. In the appeal as originally filed in pursuance of the special leave granted to the assessee, the prayer portion was inadvertently left out. Subsequently, the assessee prayed that — (a) the report of the Investigation Commission dated May 24, 1954, be quashed, (b) the settlement made on the basis of the report and the directions given by the Central Government in pursuance thereof and the proceedings for recovery of arrears of tax be all quashed, and (c) the amounts already recovered may be ordered to be refunded. With regard to the last prayer, we may state here that it was not pressed before us and we are relieved from the task, at least in this appeal, of deciding in what circumstances and on what considerations a refund of tax voluntarily paid can be claimed.

21. Therefore, the first and foremost question before us is the validity of the settlement made under Section 8-A of the Act. On behalf of the assessee the main argument is that Section 5(1) of the Act having been held ultra vires the Constitution the very foundation for the report of the Investigation Commission has disappeared and a settlement based thereon is neither valid, nor can it be enforced. On behalf of the respondents, the learned Attorney-General has contended that there is no decision of this Court which has held that Section 5(1) of the Act is wholly void and on a proper construction of the various sections of the Act, it will be found that there are two separate and distinct procedures or jurisdictions which the Investigation Commission may follow or exercise: one is investigation and the other relates to settlement. He has submitted that the jurisdiction conferred on the Investigation Commission under Section 8-A, which was inserted in the Act in 1949 by Section 33 of Act 67 of 1949, is not affected by the decision in *Muthiah*¹ case and if the Investigation Commission had jurisdiction to entertain an application from the assessee for settlement, approve of the same and refer it to the Central Government, the latter had also jurisdiction to accept it under sub-section (1) and make necessary orders under sub-section (2) of Section 8-A. In short, the argument of the learned Attorney-General is that there is nothing in *Muthiah*'s decision (supra) (1) which renders Section 8-A constitutionally invalid.

22. It is necessary to read at this stage the relevant provisions of the Act insofar as they bear upon the problems before us. We have said that the Act came into force on May 1, 1947. This was before the coming into force of the Constitution of India, and no question of the violation of any fundamental rights guaranteed by the Constitution arose on that date. Section 3 of the Act empowers the Central Government (now Union Government) to constitute a Commission to be called the

Income Tax Investigation Commission, whose duties shall be (to quota the words of the section)—

“(a) to investigate and report to the Central Government on all matters relating to taxation on income, with particular reference to the extent to which the existing law relating to, and procedure for, the assessment and collection of such taxation is adequate to prevent the evasion thereof;

(b) to investigate in accordance with the provisions of this Act any case or point in a case referred to it under Section 5 and make a report thereon (including such interim reports as the Commission may think fit) to the Central Government in respect of all or any of the assessments made in relation to the case before the date of its report or interim report, as the case may be.”

We are concerned in this appeal with the duty of the Commission referred to in Section 3(b) above. Section 4 deals with the composition of the Commission, details whereof are unnecessary for our purpose. Sub-sections (1), (2) and (4) of Section 5 are relevant to the problems before us and must be read:

“5. (1). The Central Government may at any time before the 1st day of September 1948 refer to the Commission for investigation and report any case or points in a case in which the Central Government has prima facie reasons for believing that a person has to a substantial extent evaded payment of taxation on income, together with such material as may be available in support of such belief, and may at any time before the 1st day of September, 1948 apply to the Commission for the withdrawal of any case or points in a case thus referred, and if the Commission approves of the withdrawal, no further proceedings shall thereafter be taken by or before the Commission in respect of the case or points so withdrawn.

(2) The Commission may, after examining the material submitted by the Central Government with reference to any case or points in a case and making such investigation as it considers necessary, report to the Central Government that in its opinion further investigation is not likely to reveal any substantial evasion of taxation on income and on such report being made the investigation shall be deemed to be closed.

(3) * * *

(4) If in the course of investigation into any case or points in a case referred to it under sub-section (1), the Commission has reason to believe—

(a) that some person other than the person whose case is being investigated has evaded payment of taxation on income, or

(b) that some points other than those referred to it by the Central Government in respect of any case also require investigation,

it may make a report to the Central Government stating its reasons for such belief and, on receipt of such report, the Central Government shall notwithstanding anything contained in sub-section (1), forthwith refer to the Commission for investigation the case of such other person or such additional points as may be indicated in that report.”

Section 5 as originally enacted mentioned the date 30th of June, 1948, but by Act

49 of 1948 the date substituted was "1st day of September, 1948". Section 6 states the powers of the Commission, and they may be summarised thus:

(a) the Commission has power to require any person or banking or other company to give information on relevant points;

(b) it has power to administer oaths and all the powers of a civil court to take evidence, enforce the attendance of witnesses etc;

(c) it has power to impound and retain a document in its custody.

(d) it has power to ask an authorised official to examine accounts and interrogate any person;

(e) it has power to give directions to an authorised official;

(f) it has power to close the investigation and make a best of judgment assessment in respect of a person who refuses or fails to attend in person, to give evidence or produce documents etc; and

(g) it has power of seizure, search etc. in certain specified circumstances.

23. Sections 6-A and 6-B deal with the power of the Commission to tender immunity from prosecution and to withdraw such tender. Section 7 states the procedure to be followed by the Commission, sub-sections (2), (4) and (6) whereof need only be referred to here:

"7. (2) In making an investigation under clause (b) of Section 3, the Commission shall act in accordance with the principles of natural justice, shall follow as far as practicable the principles of the Indian Evidence Act, 1872 (1 of 1872), and shall give the person whose case is being investigated a reasonable opportunity of rebutting any evidence adduced against him; and the power of the Commission to compel production of documents shall not be subject to the limitation imposed by Section 130 of the Indian Evidence Act, 1872 (1 of 1872), and the Commission shall be deemed to be a court and its proceedings legal proceedings for the purpose of Sections 5 and 6 of the Bankers' Books Evidence Act, 1891 (18 of 1891).

(3) * * *

(4) No person shall be entitled to inspect, call for, or obtain copies of, any documents, statements or papers or materials furnished to, obtained by or produced before the Commission or any authorised official in any proceedings under this Act; but the Commission, and after the Commission has ceased to exist such authority as the Central Government may in this behalf appoint, may, in its discretion, allow such inspection and furnish such copies to any person:

Provided that, for the purpose of enabling the person whose case or points in whose case is or are being investigated to rebut any evidence brought on the record against him, he shall, on application made in this behalf and on payment of such fees as may be prescribed by Rules made under this Act, be furnished with certified copies of documents, statements, papers and materials brought on the record by the Commission.

(5) * * *

(6) In any proceedings under this Act, the Commission may, in its discretion, admit in evidence and act upon any document notwithstanding that it is not duly stamped or registered."

Section 8 states in effect what the Commission shall do on the conclusion of the investigation: it states that the materials brought on the record shall be considered by all the members, and the report shall be in accordance with the opinion of the majority. Sub-section (2) of Section 8 gives the Central Government power to direct reopening of assessment proceedings on the report of the Commission. Sub-section (4) states that in the assessment or reassessment proceedings in pursuance of a direction given under sub-section (2), the findings recorded by the Commission shall be final, subject to the provisions of sub-sections (5) and (6). Then comes Section 8-A which must be quoted in full:

"8-A. (1) Where any person concerned in any case referred to or pending before the Commission for investigation applies to the Commission at any time during such investigation to have the case or any part thereof settled insofar as it relates to him, the Commission shall, if it is of opinion that the terms of the settlement contained in the application may be approved, refer the matter to the Central Government, and if the Central Government accepts the terms of such settlement, the Commission shall have the terms thereof recorded and thereupon the investigation, insofar as it relates to matters covered by such settlement, shall be deemed to be closed.

(2) For the purpose of enforcing the terms of any settlement arrived at in pursuance of sub-section (1), the Central Government may direct that such proceedings as may be appropriate under the Indian Income Tax Act, 1922 (11 of 1922), the Excess Profits Tax Act, 1940 (15 of 1940) or any other law may be taken against the person to whom the settlement relates, and, in particular, the provisions of the second proviso to clause (a) of sub-section (5) of Section 23, Section 24-B, the proviso to sub-section (2) of Section 25-A, the proviso to sub-section (2) of Section 26 and Sections 44 and 46 of the Indian Income Tax Act, 1922 shall be applicable to the recovery of any sum specified in such settlement by the Income Tax Officer having jurisdiction to assess the person by whom such sum is payable as if it were income-tax or an arrear of Income Tax within the meaning of those provisions.

(3) Subject to the provisions of sub-section (6) of Section 8, any settlement arrived at under this section shall be conclusive as to the matters stated therein, and no person whose case has been so settled shall be entitled to reopen in any proceeding for the recovery of any sum under this section or in any subsequent assessment or reassessment proceeding relating to taxation on income or in any other proceeding before any court or other authority any matter which forms part of such settlement.

(4) Where a settlement has been accepted by Government under sub-section (1), no proceedings under Section 34 of the Indian Income Tax Act, 1922 (11 of 1922), or under Section 15 of the Excess Profits Tax Act, 1940 (15 of 1940), shall be initiated in respect of the items of income covered by the settlement unless the initiation of such proceedings is expressly allowed by the terms of the settlement."

Section 9 bars the jurisdiction of courts, but it is not disputed that if any of the provisions of the Act are ultra vires the Constitution, Section 9 will neither cure the defect nor stand in the way of the assessee. Section 10, the last section, gives the Central Government power to make rules.

24. The above recital gives a brief conspectus of the main provisions of the Act. It is necessary now to refer to a few earlier decisions of this Court with regard to some of these provisions. The earliest in point of time is the decision in *Suraj Mall Mohta and Co. v. A.V. Viswanatha Sastri*²⁴ where sub-section (4) of Section 5 of the Act and the procedure prescribed by the Act insofar as it affected the persons proceeded against under that sub-section, were held to be discriminatory and therefore void and unenforceable. No opinion was, however, expressed on the validity of Section 5(1) of the Act. In *Shree Meenakshi Mills Ltd., Madurai v. Sri A.V. Viswanatha Sastri*²⁵ it was held that after the coming into force on July 17, 1954, of the Indian Income Tax (Amendment) Act, 1954, (33 of 1954) which operated on the same field as Section 5(1) of the Act, the provisions of Section 5(1) became void and unenforceable as being discriminatory in character. It was further held that when an Act was valid in its entirety before the date of the Constitution, that part of the proceedings regulated by the special procedure and taken during the pro-Constitution period could not be questioned however discriminatory it might have been, but the discriminatory procedure could not be continued after the coming into force of the Constitution. In that case (*Meenakshi Mills case*)³ the Investigation Commission had not even commenced the proceedings though a period of seven years had elapsed and the investigation was pending when the writ petitions were filed. In those circumstances it was held that the proceedings before the Investigation Commission which had become discriminatory could no longer be continued. Then came the decision in *M.C.T. Muthiah v. CIT*¹. The facts relevant to that decision were that the Investigation Commission held an enquiry into three cases and submitted a report on August 26, 1952 finding a particular sum to be the undisclosed income during the investigation period. The Central Government accepted the report and passed an order under Section 8(2) of the Act on September 16, 1952. Notices under Section 34 of the Indian Income Tax Act were then issued and reassessments except for one year were made on the findings of the Commission, which were treated as final and conclusive. The re-assessment orders were served on the assesseees in February and May 1954. On December 6, 1954, the assesseees filed their writ petitions challenging the constitutionality of Section 5(1) of the Act. It was held by the majority that Section 5(1) was discriminatory and violative of the fundamental right guaranteed under Article 14 of the Constitution, because Section 34 of the Indian Income Tax Act, 1922 as amended in 1948 operated on the same field and from and after January 26, 1950, it included the strip of territory which was also occupied by Section 5(1) and two substantially different laws of procedure, one more prejudicial to the assessee than the other, could not be allowed to operate on the same field in view of the guarantee of Article 14 of the Constitution. In the result it was held that barring those cases which were already concluded by reports made by the Commission and directions given by Government before January 26, 1950, the cases which were pending before the Commission for investigation as also assessment or re-assessment proceedings which were pending on January 26, 1950, were hit by Article 14. The assessment orders were accordingly quashed as being unconstitutional.

25. Now, we come back to the problems before us: (1) what is the effect of Muthia's decision (*supra*)¹ in the present case, and (2) does the Act contemplate two separate and distinct, but severable, procedures or jurisdictions — one relating to investigation and the other to settlement, so that the vice of discrimination (if any) attaches to the investigation procedure only and not to the other?

26. We do not see how the learned Attorney-General can escape from the position that Muthia's decision (*supra*)¹ holds in express terms that Section 5(1) of the Act was hit by Article 14 of the Constitution on and after January 26, 1950. The *ratio* of the decision was thus explained in the majority judgment at p. 1260, 1261:

"After 8th September, 1948, there were two procedures simultaneously in operation, the one under Act 30 of 1947 and the other under the Indian Income Tax Act with reference to persons who fell within the same class or category viz. that of the substantial evaders of income-tax. After 8th September, 1948, therefore, some persons who fell within the class of substantial evaders of income tax were dealt with under the drastic and summary procedure prescribed under Act 30 of 1947, while other persons who fell within the same class of substantial evaders of income-tax could be dealt with under the procedure prescribed in the Indian Income Tax Act after service of notice upon them under the amended Section 34(1) of the Act. Different persons, though falling under the same class or category of substantial evaders of income tax, would, therefore, be subject to different procedures, one a summary and drastic procedure and the other a normal procedure which gave to the assessee various rights which were denied to those who were specially treated under the procedure prescribed in Act 30 of 1947.

The legislative competence being there, these provisions, though discriminatory, could not have been challenged before the advent of the Constitution. When, however, the Constitution came into force on 26th January 1950, the citizens obtained the fundamental rights enshrined in Part III of the Constitution including the right to equality of laws and equal protection of laws enacted in Article 14 thereof, and whatever may have been the position before January 26, 1950, it was open to the persons alleged to belong to the class of substantial evaders thereafter to ask as to why some of them were subjected to the summary and drastic procedure prescribed in Act 30 of 1947 and others were subjected to the normal procedure prescribed in Section 34 and the cognate sections of the Indian Income Tax Act, the procedure prescribed in Act 30 of 1947 being obviously discriminatory and, therefore, violative of the fundamental right guaranteed under Article 14 of the Constitution."

27. That *ratio* is equally applicable in the present case, and if Section 5(1) of the Act is unenforceable after January 26, 1950, the reference made thereunder against the assessee must also fall after that date and with it must go overboard all that was done under the drastic and summary procedure prescribed under the Act after January 26, 1950. Two possible arguments that (1) substantial evaders whose cases were referred by the Central Government for investigation by the Commission before September 1, 1948, formed a class by themselves and (2) that proceedings having started before the Commission under a reference valid at the time when it was made cannot be affected by any subsequent amendment of the Income Tax Act, 1922 were raised, but not accepted in *Suraj Mall Mohta*², *Meenakshi Mills*³ or *Muthia case*¹. There has been some argument before us as to how the two procedures — one prescribed under the Income Tax Act, 1922 and the other under the Act — compare and contrast with each other; but this is a point which was canvassed at great length in each of the three cases mentioned above. This Court found in unequivocal terms that the procedure prescribed under the Act was more summary and drastic, and in *Suraj Mall Mohta case*² the substantial differences between the two procedures were summarised at pp. 463-66 of the report. We do not propose to cover the same ground again, but content ourselves with drawing attention to what

was pointedly said in *Suraj Mall Mohta case*², namely, that it was conceded on behalf of Government that the procedure prescribed by the impugned Act in Sections 6 and 7, which we have read earlier, was more drastic than the procedure prescribed in Sections 37 and 38 of the Indian Income Tax Act. It was stated therein that though in the first stages of investigation there was some similarity between the two procedures, the overall picture was not the same.

28. The learned Attorney-General has not seriously contested the correctness of this position, but has argued that what we are concerned with in the present case is not the mere possibility of a differential treatment, but what actually was done by the Commission in the case of the present assessee after January 26, 1950. He has submitted that the assessee was not subjected to any differential treatment in fact, and has invoked to his aid the ratio of our decision in *Syed Qasim Razvi v. State of Hyderabad*²⁶ where the majority judgment laid down the following tests: in a case where part of the trial cannot be challenged as bad, it is incumbent on the court to consider, *first*, whether the discriminatory provisions of the law can be separated from the rest and even without them a fair measure of equality in the matter of procedure can be secured, and *secondly*, whether the procedure actually followed did or did not proceed upon the discriminatory provisions and it was stated that a mere threat or possibility of unequal treatment was not sufficient to invalidate the subsequent proceedings. A reference was there made to the earlier decisions of this Court in *Keshavan Madhava Menon v. State of Bombay*²⁷, and *Lachmandas Kewalram Ahuja v. State of Bombay*²⁸, and the decision in *Lachmandas case* again a majority decision, was distinguished on two grounds: first, the question as to whether after eliminating the discriminatory provisions it was still possible to secure a fair measure of equality with the normal procedure was neither raised nor considered; secondly, it was assumed that it was not possible to proceed with the trial without following the discriminatory procedure and as that procedure became void on the coming into force of the Constitution, the jurisdiction to proceed under that procedure came to an end. Applying the tests laid down in the majority decision of *Syed Qasim Razvi case*⁴, the learned Attorney-General has contended that in the present case the discriminatory provisions can be separated from the rest of the Act, and the assessee was not in fact subjected to any discriminatory procedure. He has sought to distinguish Muthia's case on the same ground viz. that the re-assessments made in that case were actually based on a discriminatory procedure.

29. In our view the ratio of the majority decision in *Syed Qasim Razvi case*⁴ has no application in the case under our consideration, and the principle which applies is what was laid down in *Lachmandas case*⁵. The majority decision in *Syed Qasim Razvi case*⁴ proceeded on the finding (to quote the words of Mukherjea, J., who delivered the majority judgment) that "although there were deviations in certain particulars, the accused had substantially the benefit of a normal trial". The minority judgments, however, very pertinently pointed out that the discriminatory provisions were an integral part of the regulation under which the accused person in that case was tried and in fact the discriminatory provisions were applied. Bose, J. (as he then was) expressed the view (at p. 618) "that in testing the validity of a law, it is irrelevant to consider what has been done under it, for a law is either constitutional or not and the validity or otherwise cannot depend upon what has been accomplished under its provisions."

30. It is, we think, unnecessary to go into the controversy which arises out of the

two views expressed above. For the present case, it is sufficient to say that (1) the discriminatory provisions are an integral part of the procedure prescribed under the Act which cannot be separated from the rest; and (2) we are satisfied that the report which led to the settlement was made by the Investigation Commission in pursuance of and as a direct result of the discriminatory procedure which it followed. Indeed, the Investigation Commission followed the only procedure of investigation prescribed under the Act, which was a drastic and summary procedure, and if that procedure became void on the coming into force of the Constitution, the jurisdiction of the Investigation Commission practically came to an end (see *Lachmandas's case*⁵).

31. It is necessary to explain here why we cannot accept the contention of the learned Attorney-General that there are two procedures or two jurisdictions under the Act. What in substance is the effect of the provisions of the Act, insofar as they relate to the Commission's duty under Section 3(b)? The Commission receives a reference under Section 5(1). If it does not proceed under Section 5(2), it exercises such of its powers under Section 6 as it considers necessary. It then follows the procedure laid down in Section 7 and submits its report under Section 8. On that report, the Central Government takes action under Section 8(2). If, however, the assessee applies for settlement, even then the Commission has the duty to report to Government if the terms of settlement are approved by it. To fulfil this duty, the Commission must get the materials by exercising its powers under Section 6 and by following the procedure laid down in Section 7. That is exactly what was done in the present case. An authorised official was asked to examine the accounts etc. under Section 6(3). He examined the accounts and submitted an interim report in 1953. He followed the procedure laid down in the Act with regard to inspection of documents, examination of witnesses etc. He then submitted a final report. The Commission then heard the assessee on May 19, 1954, and reserved orders. On May 20, 1954, after the assessee knew what the final finding of the Commission was going to be, he filed an application for settlement. The Commission made its final report four days after. It is difficult to understand how in the circumstances stated above, it can be said that the Commission followed a non-discriminatory procedure or that it had two jurisdictions — one relating to investigation and the other to settlement. The jurisdiction was really one, and the procedure followed also the same. It is not as though the Act provided a separate procedure for purposes of effecting a settlement; nor is this a case where a settlement has been made without applying any of the provisions relating to investigation. A full investigation was made, and after the assessee had been subjected to the drastic and summary procedure under the Act, he was told what the result of the investigation was. Then, he made an application for settlement, which was approved by the Commission under Section 8-A.

32. We are accordingly of the view that the learned Attorney-General has failed to make out his case that (1) Muthia's decision (*supra*)¹ does not apply and (2) the settlement under Section 8-A of the Act is a legally valid settlement by reason of the severability or non-application of the discriminatory procedure under the Act in the case of the assessee.

33. This brings me to the second question, that of waiver of a fundamental right, which is as important as it is complex. It is a question on which unfortunately we have not been able to achieve unanimity. It is beset with this initial difficulty that the present appeal is not from a judgment or order rendered after the trial of

properly framed issues; it is from an order which merely rejected the prayer of the assessee that his properties attached in execution of the recovery certificate should be released and the amounts paid under the terms of the settlement refunded. The question of waiver was neither raised, nor tried; and the necessary facts were not ascertained or determined by the Revenue Authority concerned. Unfortunately, the filing of a statement of their case by the parties was also dispensed with, the result whereof has been that the question of waiver has been urged for the first time in the course of arguments here. We have, however, heard full arguments on it, and I proceed to consider it on such materials as have been placed before us. It is necessary to make one point clear. The respondents have raised the plea of waiver, and the onus lies heavily on them to establish the essential requirements in support of the plea.

34. Two points arise in this connection: (1) have the respondents established, on the materials before us, the necessary facts on which a plea of waiver can be founded; and (2) if so, can a fundamental right guaranteed by the Constitution be waived at all. If the first point is answered in the negative, the second point need not be answered in the abstract. On behalf of the respondents, it has been submitted that assuming (without conceding) that the discriminatory provisions of the Act were applied in the case of the assessee before he asked for a settlement, the materials on record show that he never objected to the procedure adopted, voluntarily asked for a settlement, got by the settlement the benefit of reducing his liability for both tax and penalty, and paid without demur the following instalments (some even after Muthia's decision, *supra*)¹

Payments made up to April 55		10,000
Payment made on	10-05-55	5000
	19-06-55	5000
	07-07-55	5000
	13-08-55	5000
	07-09-55	5000
	15-10-55	5000
	10-11-55	5000
	15-12-55	5000
	08-02-56	5000

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13-02-56	5000
07-03-56	5000
14-05-56	5000
19-05-56	5000
13-06-56	5000
06-08-56	5000
07-09-56	5000
09-10-56	5000
10-11-56	5000
23-12-56	5000
14-01-57	5000
29-03-57	5000
04-06-57	5000
08-09-57	8000
	<hr/>
	1,28,000

The learned Attorney-General has in this connection referred us to the application for settlement which the assessee had made to the Commission, wherein the following statements were made:

"In view of the fact that though no disclosure statement had been

made before the submission of his reports by the authorised official, still during the enquiry before the Commission, the assessee and his auditors admitted their liability to tax in respect of the aforesaid sum of Rs 4,47,915, the Commission was of the opinion that the assessee should be granted the benefit of a settlement on the lower

concessional basis of payment of 75 per cent of the undisclosed income by way of tax. The Commission was also of the opinion that the assessee should pay by way of penalty a sum of Rs 14,064.

The assessee accepts the conclusions of the Commission as regards the amount of income that escaped assessment, the tax payable thereon and the penalty payable as aforesaid."

On the basis of these statements, the learned Attorney-General has argued that there is no foundation for the suggestion made on behalf of the assessee that the application for settlement was made "under the pressure of circumstances and in view of the coercive machinery of the Act". He has submitted that the necessary facts on which the plea of waiver is founded have been established, and he has relied on three cases decided by this Court, where according to him the effect of the decisions was to accept such a plea in circumstances very similar: *Dewan Bahadur Seth Gopal Das Mohta v. Union of India*²⁹, *Baburao Narayanrao Sanas v. Union of India*³⁰; and *Laxmanappa Hanumatappa Jamkhadi v. Union of India*³¹. On behalf of the assessee, it is contended on the contrary that the necessary facts to found a plea of waiver are totally absent in the present case, and none of the aforesaid three decisions which were all pronounced on the same day proceed on a plea of waiver.

35. Two of the three decisions referred to above relate to a settlement made under Section 8-A and the third to an order made under Section 8(2) of the Act. All the three decisions were pronounced on applications made under Article 32 of the Constitution, and not on any appeal from an order of the Revenue Authority. In *Gopal Das Mohta case*¹⁰ the argument urged was, inter alia, that Sections 5, 6, 7 and 8 of the Act were invalid and ultra vires as they contravened the provisions of Articles 14, 19(1)(f), and 31 of the Constitution and the prayer made was that the entire proceedings should be quashed as also all orders made by the Central Government in pursuance of the settlement under Section 8-A. In rejecting the argument and prayer, Mahajan, C.J. who delivered the judgment of the Court said at p. 776—

"In our judgment this petition is wholly misconceived. Whatever tax the petitioner has already paid, or whatever is still recoverable from him, is being recovered on the basis of the settlement proposed by him and accepted by the Central Government. Because of his request for a settlement no assessment was made against him by following the whole of the procedure of the Income Tax Act. In this situation unless and until the petitioner can establish that his consent was improperly procured and that he is not bound thereby he cannot complain that any of his fundamental rights has been contravened for which he can claim relief under Article 32 of the Constitution. Article 32 of the Constitution is not intended for relief against the voluntary actions of a person. His remedy, if any, lies in other appropriate proceedings."

There has been a good deal of argument before us as to the true effect of the decision in *Gopal Das Mohta case*¹⁰. While I recognise that the reason stated for the decision viz. that Article 32 is not intended for relief against voluntary actions of a person, comes very near to saying that a person has waived his protection in a given case since whatever injury he may incur is due to his own act rather than to the enforcement of an unconstitutional measure against him, I am unable to hold that the decision proceeded strictly on the doctrine of waiver; it is perhaps true to say

that one of the observations made therein are of a "Delphic nature to be translated into concreteness by the process of litigating elucidation" (to borrow the words of Frankfurter, J. in *Machinists v. Gonzales*³²). It seems to me that the decision proceeded more upon the scope of Article 32 than upon the doctrine of waiver. I am fortified in this view by the circumstance that in a decision given only a month earlier (see *Behram Khurshed Pesikaka v. State of Bombay*)³³ the same learned Chief Justice expressed himself strongly, though tentatively, against introducing in our Constitution the doctrine of waiver as enunciated by some American Judges in construing the American Constitution, without a fuller discussion of the matter. The report of *Gopal Das Mohta case*¹⁰ does not contain any reference to the doctrine of waiver, and it is obvious that no fuller discussion of the doctrine took place in that case. It is not, therefore, reasonable to hold that the effect of *Gopal Das Mohta case*¹⁰ is to uphold the doctrine of waiver. *Babu Rao case*⁸ merely followed *Gopal Das Mohta case*¹⁰ and gave no separate reasons. *Laxmanappa Jamkhandi case*² dealt with an order under Section 8(2) of the Act and said at p. 772:

"From the facts stated above it is plain that the proceedings taken under the impugned Act 30 of 1947 concluded so far as the Investigation Commission is concerned in September, 1952, more than two years before this petition was presented in this Court. The assessment orders under the Income Tax Act itself were made against the petitioner in November 1953. In these circumstances we are of the opinion that he is entitled to no relief under the provisions of Article 32 of the Constitution. It was held by this Court in *Ramjilal v. ITO*³⁴ that as there is a special provision in Article 265 of the Constitution, that no tax shall be levied or collected except by authority of law, clause (1) of Article 31 must therefore be regarded as concerned with deprivation of property otherwise than by the imposition or collection of tax, and inasmuch as the right conferred by Article 265 is not a right conferred by Part III of the Constitution, it could not be enforced under Article 32. In view of this decision it has to be held that the petition under Article 32 is not maintainable in the situation that has arisen and that even otherwise in the peculiar circumstances that have arisen it would not be just and proper to direct the issue of any of the writs the issue of which is discretionary with this Court."

Here, again, there is no reference to the doctrine of waiver, and the case was decided on the ambit and scope of Article 32 of the Constitution.

36. I would hold, therefore, that the decisions of this Court relied on by the learned Attorney-General do not help him in establishing waiver. Let me now examine the circumstances on which the learned Attorney-General founds his plea of waiver. Indeed, it is true that the assessee submitted to the discriminatory procedure applied to him by the Commission; he also asked for a settlement under which he agreed to pay 75% of his alleged tax liability and a small amount of penalty; he made some payment in instalments even after Muthia's decision in December, 1955. Do these circumstances amount to waiver? It is to be remembered that in 1953-54 when the discriminatory procedure of the Act was applied to him and the report against him was made by the Commission on which the settlement is based, the assessee did not know, nor had it been declared by a court of competent jurisdiction that Section 5(1) of the Act was ultra vires. In his application for a settlement, he said clearly in para 3 that the Commission announced it as its view that the income, profits and gains that had escaped assessment in the hands of the assessee was Rs 4,47,915. The assessee also knew that under the Act this finding was final and

binding on him. If in these circumstances, the assessee made an application for settlement, can it be said that it is a voluntary or intentional relinquishment of a known right? I venture to think not. It has been said that "waiver" is a troublesome term in the law. The generally accepted connotation is that to constitute "waiver", there must be an intentional relinquishment of a known right or the voluntary relinquishment or abandonment of a known existing legal right, or conduct such as warrants an inference of the relinquishment of a known right or privilege. Waiver differs from estoppel in the sense that it is contractual and is an agreement to release or not to assert a right; estoppel is a rule of evidence. (See *Dawson's Bank Limited v. Nippon Menkwa Kabushiki Kaisha*³⁵.) What is the known legal right which the assessee intentionally relinquished or agreed to release in 1953-54? He did not know then that any part of the Act was invalid, and I doubt if in the circumstances of this case, a plea of "waiver" can be founded on the maxim of "ignorance of law is no excuse". I do not think that the maxim "ignorance of law is no excuse" can be carried to the extent of saying that every person must be presumed to know that a piece of legislation enacted by a legislature of competent jurisdiction must be held to be invalid, in case it prescribes a differential treatment, and he must, therefore, refuse to submit to it or incur the peril of the bar of waiver being raised against him. I do not think that such prescience is a necessary corollary of the maxim. On the contrary, the presumption, if any, which operated at the relevant time was the presumption that a law passed by a competent legislature is valid, unless declared unconstitutional by a court of competent jurisdiction. Furthermore, I do not think that any inference of waiver can be retrospectively drawn from the instalments paid in 1956-57, particularly when the question of refund of the amounts already paid is no longer a live issue before us. It would, I think, be going too far to hold that every unsuspecting submission to a law, subsequently declared to be invalid, must give rise to a plea of waiver: this would make constitutional rights depend for their vitality on the accident of a timely challenge and render them illusory to a very large extent.

37. I hold, therefore, that the necessary foundation for sustaining the plea of waiver has not been laid in this case, and the onus being on the respondents, the plea must fail.

38. In view of my finding that the necessary foundation on facts for sustaining the plea of waiver has not been laid in this case, it becomes unnecessary to decide, in the abstract, the further question if a right guaranteed by any of the provisions in Part III of the Constitution can be waived at all. I am of the view that this Court should indeed be rigorous in avoiding to pronounce on constitutional issues where a reasonable alternative exists; for we have consistently followed the two principles (a) that "the court will not anticipate a question of constitutional law in advance of the necessity of deciding it" (*Weaver on Constitutional Law*, p. 69) and (b) "the court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied" (*ibid*, p. 69).

39. My Lord the Chief Justice and my learned Brother Kapur, J. have however expressed the view that the fundamental right guaranteed under Article 14 cannot be waived; my learned Brethren Bhagwati and Subba Rao, JJ. have expressed the view that none of the fundamental rights guaranteed by the Constitution can be waived.

40. I greatly regret to have to say that I have come to a conclusion different from

theirs with regard to this question, and as they have thought fit to express their views on it I proceed now to explain why I have come to a conclusion different from those of my learned Brethren on this question.

41. This question was mooted, though not fully answered, in *Behram Khurshed Peshikaka Case*¹¹. Venkatarama Aiyar, J. expressed his views at pp. 638 to 643 of the report. Mahajan, C.J. with whom Mukherjea, Vivian Bose and Ghulam Hasan, JJ. concurred, expressed his views at pp. 651 to 655 of the report, and my Lord the Chief Justice as Das, J. reserved his opinion on the question. The view which Venkatarama Aiyar, J. expressed was this: if the constitutional provision which has been infringed affects the competence of the legislature which passed the law, the law is a nullity; as for example, when a State enacts a law which is within the exclusive competence of the Union; when, however, a law is within the competence of the legislature which passed it and the unconstitutionality arises by reason of its repugnancy to provisions enacted for the benefit of individuals, it is not a nullity, but is merely unenforceable; such unconstitutionality can be waived and in that case the law becomes enforceable. He said that in America this principle was well settled and he referred to Cooley on Constitutional Limitations, Volume 1, pp. 368 to 371; Willis on Constitutional Law at pp. 524, 531, 542 and 558; *Rottschaefer on Constitutional Law* at pp. 28 and 29-30. He then referred to certain American decisions in support of his views and then said:

"The position must be the same under our Constitution when a law contravenes a prescription intended for the benefit of individuals.... It is open to any person whose rights have been infringed to waive it and when there is waiver, there is no legal impediment to the enforcement of the law. It will be otherwise if the statute was a nullity; in which case it can neither be waived nor enforced. If then the law is merely unenforceable and can take effect when waived, it cannot be treated as non est and as effaced out of the statute-book."

The contrary view expressed by Mahajan, C.J. can be best explained in his own words:

"We think that it is not a correct proposition that constitutional provisions in Part III of our Constitution merely operate as a check on the exercise of legislative power. It is axiomatic that when the law-making power of a State is restricted by a written fundamental law, then any law enacted and opposed to fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The legislative power of the Parliament and the State Legislatures as conferred by Articles 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of the Constitution."

His Lordship then referred to Article 13 of the Constitution and said that it was a clear and unequivocal mandate of the fundamental law prohibiting the State from making any laws which came into conflict with Part III of the Constitution. His Lordship added:

"In our opinion the doctrine of waiver enunciated by some American Judges in construing the American Constitution cannot be introduced in our Constitution without a fuller discussion of the matter.... Without finally expressing an opinion on this question, we are not for the moment convinced that this theory has any

relevancy in construing the fundamental rights conferred by Part III of the Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for individual benefit, though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy."

42. It would appear that the two main reasons which Mahajan, C.J. gave in support of the views expressed by him were these: Firstly, he held that the effect of Article 13 of the Constitution was to prohibit the State from making any laws which came into conflict with Part III of the Constitution and he recognised no such distinction as was drawn by Venkatarama Aiyar, J. between absence of legislative power (that is, incompetence of the legislature) and non-observance of provisions which operate merely as a check on the exercise of legislative power. He thought that absence of legislative power and check on the exercise of legislative power were both aspects of want of legislative power. Secondly, he referred to the Preamble and the scheme of Part III of the Constitution in support of his view that the doctrine of waiver did not apply. I shall take these reasons in the order in which I have stated them.

43. First, as to the effect of Article 13 of the Constitution. Article 13 is in two parts: the first part deals with "all laws in force in the territory of India immediately before the commencement of this Constitution" and says that so far as such laws are inconsistent with the provisions of Part III, they shall to the extent of such inconsistency be void; the second part deals with laws made after the commencement of the Constitution and says that "the State shall not make any law which takes away or abridges the rights conferred by Part III" of the Constitution and any law made in contravention of clause (2) of Article 13 shall to the extent of the contravention be void. It seems clear to me that the article itself recognises the distinction between absence of legislative power which will make the law made by an incompetent legislature *wholly* void, and exercise of legislative power in contravention of a restriction or check on such power, which will make the law void to the extent of the inconsistency or contravention. The use of the words "to the extent of the inconsistency" and "to the extent of the contravention" indubitably points to such a distinction, and indeed this was pointed out in *Bhikaji Narain Dhakras v. State of Madhya Pradesh*¹⁴. This was an unanimous decision of this Court and several earlier decisions including the decision in *Keshavan Madhava Menon case*⁵, on which Mahajan, C.J. placed so much reliance, were considered therein. The decision in *Behram Khurshed Pesikaka case*¹¹ was also considered, and then the following observations were made with regard to Article 13 of the Constitution at p. 598—

"Article 13(1) by reason of its language cannot be read as having obliterated the entire operation of the inconsistent law or having wiped it out altogether from the statute-book. Such law existed for all past transactions and for enforcement of rights and liabilities accrued before the date of the Constitution, as was held in *Keshavan Madhava Menon case*⁵. The law continued in force even after the commencement of the Constitution, with respect to persons who were not citizens and could not claim

the fundamental right. In short, Article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with Article 19(1)(g) read with clause (6) as it then stood ineffectual, nugatory and devoid of any legal force or binding effect only in respect of the exercise of the fundamental right on or after the date of the commencement of the Constitution.... All laws, existing or future, which are inconsistent with the provisions of Part III of our Constitution are, by the express provision of Article 13, rendered void 'to the extent of such inconsistency'. Such laws were not dead for all purposes."

44. The aforesaid view expressed in *Bhikaji Narain case*³⁶ was accepted in many later decisions including the decision in *Muthia case*¹. The same distinction was again referred to in another unanimous decision of this Court in *State of Bombay v. S.M.D. Chamarbaugwala*³⁷ where at p. 885 it was observed:

"The court of appeal has rightly pointed out that when the validity of an Act is called in question, the first thing for the court to do is to examine whether the Act is a law with respect to a topic assigned to the particular legislature which enacted it. If it is, then the court is next to consider whether, in the case of an Act passed by the legislature of a Province (now a State), its operation extends beyond the boundaries of the Province or the State, for under the provisions conferring legislative powers on it such legislature can only make a law for its territories or any part thereof and its laws cannot, in the absence of a territorial nexus, have any extra territorial operation. If the impugned law satisfies both these tests, then finally the court has to ascertain if there is anything in any other part of the Constitution which places any fetter on the legislative powers of such legislature. The impugned law has to pass all these three tests."

45. Therefore, the mere use of the word "void" in Article 13 does not necessarily militate against the application of the doctrine of waiver in respect of the provisions contained in Part III of our Constitution. Under the American Constitution also, a law made in violation of a constitutional guarantee is struck down, because under Article 6 of that Constitution, "the Constitution and the laws of the United States which shall be made in pursuance thereof... shall be the supreme law of the land" I am unable, therefore, to accept the view that Article 13 shows that the doctrine of waiver can never be applied in respect of the provisions in Part III of the Constitution.

46. Let me now go to the second reason. Is there anything in the Preamble and the scheme of our Constitution, with particular reference to Part III, which will make the doctrine of waiver inapplicable? Let me first place the two Preambles side by side:

Preamble to our Constitution.

Preamble to the American Constitution, 1787.

<p>"We, the people of India, having solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens: justice, social, economic and political; liberty of thought, expression, belief, faith and worship: equality of status and of</p>	<p>"We the people of the United States, in order to form a more perfect Union, establish justice, insure domestic tranquillity, provide for the common defence, promote the general welfare, and secure the blessings of liberty to ourselves and our posterity, do ordain</p>
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opportunity; and to promote among and establish this Constitution for the them all fraternity assuring the dignity United States of America.”
 of the individual and the unity of the
 nation; in our Constituent Assembly this
 twenty-sixth day of November, 1949, do
 hereby adopt, enact and give to
 ourselves this Constitution.”

Undoubtedly, there is difference in phraseology and emphasis: more than a century and half had passed between the two Constitutions; many world events of far-reaching social and economic consequences had taken place in the meantime, and men's ideas had undergone radical changes. It may be that the dominant purposes, as shown by the Preamble of the American Constitution were: (a) to form a more perfect Union; (b) to establish justice; (c) to insure domestic tranquillity; (d) to promote general welfare; and (e) to secure the blessings of liberty. In our Constitution, the emphasis is on the welfare State — on Justice, Liberty, Equality and Fraternity. But the question before us is the limited question of the application of the doctrine of waiver. I do not find anything in the two Preambles which will make the doctrine applicable in one case and not applicable in the other.

47. It is necessary to refer here to one important distinction between the two Constitutions. Speaking broadly, the American Constitution of 1787, except for defining the enumerated powers of the Federal Government and limiting the powers of the States, was an outline of Government and nothing more. Its provisions were written in general language and did not provide minute specifications of organisation or power. It contemplated subsequent legislation and interpretation for carrying the provisions into effect. In other words, it was early recognised that the Constitution was not self-executing. The Indian Constitution is more detailed, and in Part III of the Constitution are provisions which not merely define the rights but also state to what extent they are subject to restrictions in the interests of general welfare etc. In other words, there is an attempt at adjustment of individual rights with social good, and in that sense the limitations or restrictions are also defined. But I do not think that this distinction has any particular bearing on the question as issue before us. The rights as also the restrictions are justiciable, and an interpretation of the rights given and of the restrictions imposed, by courts of competent jurisdiction is contemplated.

48. Indeed, I recognise that there is a constitutional policy behind the provisions enacted in Part III of the Constitution. In a sense, there is a legislative policy in all statutory enactments. In my opinion, the crucial question is not whether there is a constitutional or legislative policy behind a particular provision, but the question is — is the provision meant primarily for the benefit of individuals or is it for the benefit of the general public? That distinction has, I think, been recognised in more than one decision. Take, for example, an ordinary statutory enactment like Section 80 of the Code of Civil Procedure which says that no suit shall be instituted against the Government or against a public officer in respect of any act purporting to be done by such public officer in his official capacity until the expiration of two months next after a notice in writing has been given etc. There is undoubtedly a reason of public policy behind this provision, but it is open to the party for whose benefit the provision has been made to waive notice and indeed the party may be estopped by his conduct from pleading the want of notice. As the Privy Council pointed out in *AL*.

*AR. Villavar Chettiar v. Government of the Province of Madras*³⁸ there is no inconsistency between the propositions that the provisions of a section are mandatory and must be enforced by the court and that they may be waived by the authority for whose benefit they are provided. The question then is — is there anything in the statute which militates against the application of the doctrine of waiver to such right, subject to the safeguards and precautions necessary for the application of the doctrine, provided the right is for the benefit of individuals?

49. I am conscious that rights which the Constitution itself characterises as fundamental must be treated as such and it will be wrong to whittle them down. But are we whittling down fundamental rights when we say that the question of waiver of fundamental rights cannot be answered in the abstract — by a general affirmative or a general negative; the question must always depend on (a) the nature of the right guaranteed and (b) the foundation on the basis of which the plea of waiver is raised. It is to be remembered that the rights guaranteed by Part III of the Constitution are not confined to citizens alone. Some of the rights are guaranteed to non-citizens also. Moreover, they are not all rights relating to justice, liberty, equality and fraternity; some of the provisions define the rights while others indicate the restrictions or checks subject to which the rights are granted. Article 33, for example, does not give any right to any person; on the contrary it gives power to Parliament to modify the rights conferred by Part III in their application to certain categories of persons. Article 34 lays down a restriction on rights conferred by Part III while martial law is in force in any area. It is not, therefore, quite correct to say that all the provisions in Part III grant fundamental rights, though the heading is "Fundamental Rights".

50. There is, I think, a three fold classification: (1) a right granted by an ordinary statutory enactment; (2) a right granted by the Constitution; and (3) a right guaranteed by Part III of the Constitution. With regard to an ordinary statutory right there is, I think, no difficulty. It is well recognised that a statutory right which is for the benefit of an individual can in proper circumstances be waived by the party for whose benefit the provision has been made. With regard to a constitutional right, it may be pointed out that there are several provisions in our Constitution which do not occur in Part III, but which yet relate to certain rights; take, for example, the rights relating to the services under the Union and the States in Part XIV. I do not think that it can be seriously contended that a right which is granted to a government servant for his benefit cannot be waived by him, provided no question of jurisdiction is involved. I may refer in this connection to the provisions in Part XIII which relate to trade, commerce and intercourse within the territory of India. These provisions also impose certain restrictions on the legislative powers of the Union and of the States with regard to trade and commerce. As these provisions are for the benefit of the general public and not for any particular individual, they cannot be waived, even though they do not find place in Part III of the Constitution. Therefore, the crucial question is not whether the rights or restrictions occur in one part or other of the Constitution. The crucial question is the nature of the right given: is it for the benefit of individuals or is it for the general public? That, in my opinion, is the true test. I may here state that the source of the right — contractual or statutory — is not the determining factor. The doctrine of waiver is grounded on the principle that a right, statutory or otherwise, which is for the benefit of an individual can be waived by him. I am aware that a right which is for the benefit of the general public must in its actual operation relate to particular individuals, in the same way as a right for the benefit of individuals will in its actual operation arise in connection with individual A

or individual B. The test is not whether in its operation it relates to an individual. The test is — for whose benefit the right has been primarily granted for the benefit of the general public or for individuals?

51. Let me now apply this test to some of the provisions in Part III of the Constitution. These provisions have been classified under different heads: (1) right to equality, (2) right to freedom, (3) right against exploitation, (4) right to freedom of religion, (5) cultural and educational rights, (6) right to property and (7) right to constitutional remedies. There can be no doubt that some of these rights are for the benefit of the general public. Take, for example, Article 23 which prohibits traffic in human beings etc; so also Article 24 which says that no child below the age of 14 shall be employed to work in any factory or mine or engaged in any other hazardous employment. I do not wish to multiply examples and it is sufficient to state that several of these rights are rights which are meant primarily for the benefit of the general public and not for an individual. But can we say the same thing in respect of all the rights? Let us take Article 31, which says that no person shall be deprived of his property save by authority of law and that no property shall be compulsorily acquired or requisitioned save for a public purpose and save by authority of law which provides for compensation etc. Take a case where a man's property is acquired under a law which does not fix the amount of compensation or specify the principles on which or the manner in which the compensation is to be determined and given. The man whose property is taken may raise no objection to the taking of his property under such law. Indeed, he may expressly agree to Government taking his land for a public purpose under the law in question, though it does not comply with the requirements as to compensation. Can such a man after two or three years change his mind and say that the law is invalid and his land on which a school or a hospital may have been built in the meantime should be restored to him, because he could not waive his fundamental right? In my opinion, if we express the view in the abstract that no fundamental right can ever be waived, many startling and unforeseen results may follow. Take another example. Suppose a man obtains a permit or a licence for running a motor vehicle or an excise shop. Having enjoyed the benefit of the permit for several years, is it open to him to say when action is proposed to be taken against him to terminate the licence, that the law under which the permit was granted to him was not constitutionally valid? Having derived all the benefit from the permit granted to him, is it open to him to say that the very Act under which a permit was granted to him is not valid in law? Such and other startling results will follow if we decide in the abstract, by a general negative, that a fundamental right can never be waived. Take Article 32, which is a right to a constitutional remedy, namely, the right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by Part III. It is now well settled by several decisions of this Court that the right under Article 32 is itself a fundamental right. Suppose a person exercises that right and initiates appropriate proceedings for enforcement of a fundamental right. Later he thinks better of it and withdraws his application. Still later he changes his mind. Can he then say that he could not waive his right under Article 32 and the order passed on his application for withdrawal had no legal validity? We may take still another example. Under Article 30(1) of the Constitution, all minorities, whether based on religion or language, have the right to establish and administer educational institutions of their choice. Suppose, there is a minority educational institution, and the minority has the right to administer that institution, but they want grant from Government. The minority may have to surrender part of its right of administration in order to get government aid. Can the minority waive its right? Such a question arose for consideration in the

advisory opinion which we gave in connection with the Kerala Education Bill and, so far as I have been able to understand, the effect of our opinion is that the minority can surrender part of its right of administration of a school of its own choice in order to get aid from Government. If we now hold that the minority can never surrender its right, then the result will be that it will never be able to ask for government aid.

52. I do not see any such vital distinction between the provisions of the American Constitution and those of our Constitution as would lead me to the conclusion that the doctrine of waiver applies in respect of constitutional rights guaranteed by the American Constitution but will not apply in respect of fundamental rights guaranteed by the Indian Constitution. Speaking generally, the prohibition in Part III is against the State from taking any action in violation of a fundamental right. The word "State" in that Part includes the Government and Parliament of India as also the Government and legislature of each of the States and also all local or other authorities within the territory of India or under the control of the Government of India. The American Constitution also says the same thing in effect. By Article VI it states that the Constitution and the laws of the United States which shall be made in pursuance thereof shall be the supreme law of the land. It is well settled in America that the first ten amendments to the original Constitution were substantially contemporaneous and should be construed in *pari materia*. In many of the amendments the phraseology used is similar to the phraseology of the provisions of Part III of our Constitution.

53. The position under the American Constitution is well settled and a succinct statement of that position will be found in *Rottschaefer on Constitutional Law*, pp. 28-29. The learned author has summarised the position thus:

"There are certain constitutional provisions that may be waived by the person for whose protection they were intended. A person who has waived that protection in a given instance may not thereafter raise the issue that his constitutional rights have been infringed in that instance, since whatever injury he may incur is due to his own act rather than to the enforcement of an unconstitutional measure against him.

* * *

A person who would otherwise be entitled to raise a constitutional issue is sometimes denied that right because he is estopped to do so. The factor usually present in these cases is conduct inconsistent with the present assertion of that right, or conduct of such character that it would be unjust to others to permit him to avoid liability on constitutional grounds. A person may not question the constitutionality of the very provision on which he bases the right claimed to be infringed thereby, nor of a provision that is an integral part in its establishment or definition. The acceptance of a benefit under one provision of an Act does not ordinarily preclude a person from asserting the invalidity of another and severable provision thereof, but there are exceptions to this Rule. The promoters of a public improvement have been denied the right to contest the validity of the Rule apportioning its cost over the benefited lands, and a person who has received the benefits of a statute may not thereafter assert its invalidity to defeat the claims of those against whom it has been enforced in his own favour. A state is estopped to claim that its own statute deprives it of its property without due process of law; but it is permitted to assert that its own statute invades rights that its Constitution confers upon it. Prior inconsistent conduct will not, however, preclude a person from asserting the invalidity of an act if under all the circumstances its assertion involves

no unfairness or injustice to those against whom it is raised."

54. The learned Attorney-General placed reliance on the following decisions: (1) *Pierce v. Somerset Railway*²⁹; (2) *Wall v. Parrot Silver and Copper Company*⁴⁰; (3) *Pierce Oil Corporation v. Phoenix Refining Company*⁴¹; (4) *Shepard v. Barron*⁴²; (5) *United States v. Murdock*⁴³; (6) *Patton v. United States*⁴⁴; and (7) *Adams v. United States*⁴⁵. The position in America is so well settled that I think it is unnecessary to examine the aforesaid decisions in detail. I need only refer to the observations of Frankfurter, J. in *William A. Adam case*²³. The observations were made in connection with a case where a trial was held without a jury at the request of the accused person himself in spite of the guarantee of Amendment VI. The observations were—

"What was contrived as protections for the accused should not be turned into fetters. To assert as an absolute that a layman, no matter how wise or experienced he may be, is incompetent to choose between Judge and jury as the tribunal for determining his guilt or innocence, simply because a lawyer has not advised him on the choice, is to dogmatize beyond the bounds of learning or experience."

55. I have not been able to find any real reason on the basis of which the decisions given above with regard to the American Constitution can be held to be inapplicable to similar cases arising under the Indian Constitution.

56. Two subsidiary reasons have been given for holding that the position under the Indian Constitution is different. One is that ours is a nascent democracy and, therefore, the doctrine of waiver should not apply. With respect, I am unable to concur in this view. I do not think that we shall be advancing the cause of democracy by converting a fundamental right into a fetter or using it as a means for getting out of an agreement freely entered into by the parties. I appreciate that waiver is not to be light-heartedly applied, and I agree that it must be applied with the fullest rigour of all necessary safeguards and cautions. What I seriously object to is a statement in the abstract and in absolute terms that in no circumstances can a right given by any of the provisions in Part III of the Constitution be waived. Another point taken is that the provisions in Part III embody what are called "natural rights" and such rights have been retained by the people and can never be interfered with. I am unable to acquiesce in this. The expression "natural rights" is in itself somewhat vague. Sometimes, rights have been divided into "natural rights" and "civil rights", and "natural rights" have been stated to be those which are necessarily inherent or innate and which come from the very elementary laws of nature whereas civil rights are those which arise from the needs of civil as distinguished from barbaric communities. I am unable, however, to agree that any such distinction is apparent from the provisions in Part III of our Constitution: all the rights referred to therein appear to be created by the Constitution. I do not think that Locke's doctrine of "natural rights", which was perhaps the authority for the American Declaration of Independence, played any part in the enactment of the provisions of Part III of our Constitution. The doctrine which has long since ceased to receive general acceptance, has been thus explained by E.W. Paterson (see *Natural Law and Natural Rights*, Southern Methodist University Press, Dallas, 1955, p. 61):

"The theory of natural rights, for which we are indebted to the seventeenth century English philosopher, John Locke, is essentially different from the theories of natural law just discussed in that it lacked the two important characteristics abovementioned: the concept of an immutable physical order and the concept of

divine reason.... He begins with the purpose of justifying the existence of a Government with coercive powers. What inconveniences would arise if there were no Government? Men would live in a 'state of nature'; to avoid confusion with the political state I shall call this a 'condition of nature'. In such a condition man would be free to work, to enjoy the fruits of his labour, and to barter with others; he would also be free to enforce the law of nature (whose precepts Locke did not define) against every other man. Since Locke was an optimist about human nature he thought men would get along pretty well in this lawless condition. Yet the condition of nature is for Locke a fiction like the assumption of a frictionless machine in mechanics. The chief disadvantages that men in this condition would suffer were, he thought, the absence of an established law, the absence of a known and impartial Magistrate to settle disputes, the absence of a power sufficient to execute and enforce the judgment of the Magistrate. Moved by these inconveniences, men would enter into a social compact with each other whereby each would transfer to a third person, the Government, such rights over his person and property as the Government must have in order to remove these inconveniences. All other rights, privileges, and immunities he reserved, as a grantor of land conveys the fee simple to his son and reserves a life estate to himself. These reserved rights were 'natural' rights because they had originated in the condition of nature and survived the social compact."

There are, in my opinion, clear indications in Part III of the Constitution itself that the doctrine of "natural rights" had played no part in the formulation of the provisions therein. Take Articles 33, 34 and 35 which give Parliament power to modify the rights conferred by Part III. If they were natural rights, the Constitution could not have given power to Parliament to modify them. Therefore, I am of the view that the doctrine of "natural rights" affords nothing but a foundation of shifting sand for building up a thesis that the doctrine of waiver does not apply to the rights guaranteed in Part III of our Constitution.

57. The true position as I conceive it is this: where a right or privilege guaranteed by the Constitution rests in the individual and is primarily intended for his benefit and does not infringe on the right of others, it can be waived provided such waiver is not forbidden by law and does not contravene public policy or public morals.

58. In the case before us, I have held that there is no foundation on facts to sustain the plea of waiver. Therefore, I would allow the appeal with costs. The order of the Commissioner of Income Tax, Delhi, dated January 29, 1958 must be set aside and all proceedings now pending for implementation of the order of the Union Government dated July 5, 1954, must be quashed.

SUBBA RAO J.— I have had the advantage of perusing the judgments of my Lord the Chief Justice and my learned Brother S.K. Das, J. I agree with their conclusion, but I would prefer to express my opinion separately in regard to the question of the applicability of the doctrine of waiver to the fundamental rights.

60. This case raises a most serious and important question viz. whether the doctrine of waiver operates on the fundamental rights enshrined in the Constitution, a question not confined to the immediate purpose of this litigation, but to the public in general. The question is bound to arise frequently, and the varying observations already expressed by the learned Judges of this Court would lend scope for conflicting decisions involving parties in unnecessary litigation and avoidable hardship. The question was directly raised and fully argued before us. In the

circumstances, I cannot share the opinion of my learned Brother, S.K. Das, J., that this Court should avoid a decision on this question and leave it to be decided in a more appropriate case.

61. The facts have been fully stated by my Lord the Chief Justice in his judgment and I need not restate them.

62. The learned Attorney-General contended that in the American law the principle of waiver was applied to rights created by the Constitution except in cases where the protection of the rights was based upon public policy and that, by the same analogy, if no public policy was involved, even in India, the person affected by the infringement of the fundamental rights could waive the constitutional protection guaranteed to him. It was said that in the present case the appellant waived his fundamental right under Article 14 of the Constitution as the right was only in respect of his liability to tax and he could legitimately waive it. To appreciate this argument it would be convenient at the outset to notice the American law on the subject. Certain rights, which are sometimes described as the Bill of Rights, have been introduced by the amendments to the Constitution of America. They declare the rights of the people of America in respect of the freedom of religion, speech, press, assemblage and from illegal seizures. They guarantee trial by jury in certain criminal and civil matters. They give protection against self-incrimination. The Fifth Amendment of the Constitution of the United States prescribes that no person shall be deprived of life, liberty or property without due process of law; nor shall private property be taken for public use without just compensation. The Fourteenth Amendment of the Constitution introduces the rule of due process as a protection against the State action. The said amendments are intended as a protection to citizens against the action of the Union and the States. Though the rights so declared are general and wide in their terms, the Supreme Court of America, by a long course of judicial interpretation, having regard to the social conditions in that country, has given content to those rights and imposed limitations thereon in an attempt to reconcile individual rights with social good, by evolving counter-balancing doctrines of police power, eminent domain, and such others. During the course of the evolution of the law, attempts were made to apply the doctrine of waiver to the provisions of the Constitution of America. American courts applied the doctrine with great caution and in applying the same, laid down definite principles.

63. The said principles were culled out from the various decisions and clearly summarized in the authoritative text-books on the Constitution of America under different heads:

WILLIS ON CONSTITUTIONAL LAW :

1. *Self-incrimination:*

The privilege against self-incrimination, like any other privilege, is one which may be waived.

2. *Double jeopardy:*

Double jeopardy is a privilege and may be waived expressly or impliedly.

3. *Immunity against unreasonable searches and seizures:*

The immunity is one which may be waived and by consent one can make a search

and seizure reasonable.

4. *Jury trial:*

The United States Supreme Court.....held that neither a jurisdictional question nor the interest of the State was involved, but only the privilege and right of the accused, and that these were subject to waiver in accordance with the usual rules.

5. *Due Process of Law as a matter of jurisdiction:*

In order to delimit personal liberty by exercising social control, the branch of the government undertaking to do so must have jurisdiction. If it does not have jurisdiction, it is taking personal liberty (life, liberty or property) without due process of law. To this rule there are no exceptions. It cannot be waived.

COOLEY'S CONSTITUTIONAL LIMITATIONS':

Where a constitutional provision is designed for the protection solely of the property rights of the citizen, it is competent for him to waive the protection, and to consent to such action as would be invalid if taken against his will.

In criminal cases the doctrine that a constitutional privilege may be waived must be true to a very limited extent only. A party may consent to waive rights of property, but the trial and punishment for public offences are not within the provinces of individual consent or agreement.

CORPUS JURIS SECUNDUM:

It has been stated supra (p. 1050, note 32) that the doctrine of waiver extends to rights and privileges of any character, and since the word 'waiver' covers every conceivable right, it is the general rule that a person may waive any matter which affects his property, and any alienable right or privilege of which he is the owner or which belongs to him or to which he is legally entitled, whether secured by contract, conferred by statute, or guaranteed by Constitution, provided such rights and privileges rest in the individual, are intended for his sole benefit, do not infringe on the rights of others, and further provided the waiver of the right or privilege is not forbidden by law, and does not contravene public policy, and the principle is recognized that everyone has a right to waive, and agree to waive, the advantage of a law or rule made solely for the benefit and protection of the individual in his private capacity, if it can be dispensed with and relinquished without infringing on any public right and without detriment to the community at large....

As a general rule, rights relating to procedure and remedy are subject to waiver, but if a right is so fundamental in its nature as to be regarded by the state as vitally integrated in immemorially established processes of the administration of justice, it cannot be waived by anyone.

64. The cases cited at the Bar illustrate the aforesaid principles. The doctrine was applied to the obligations under a contract in *Pierce v. Somerset Railway*⁴⁶; to deprivation of property without due process of law in *Pierce Oil Corporation v. Phoenix Refining Company*⁴⁷ and *Shepard vs. Barron*⁴⁸; to trial by jury in *Patton v. United States*⁴⁹ and *Adams v. United States*⁵⁰; and to self-incrimination in *United States v. Murdock*⁵¹. It is true, as the learned counsel for the appellant contended,

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that in some of the aforesaid decisions, observations are in the nature of obiter, but they clearly indicate the trend of judicial opinion in America.

65. The American law on the subject may be summarized thus: The doctrine of waiver can be invoked when the constitutional or statutory guarantee of a right is not conceived in public interest or when it does not affect the jurisdiction of the authority infringing the said right. But if the privilege conferred or the right created by the statute is solely for the benefit of the individual, he can waive it. But even in those cases, the courts invariably administered a caution that having regard to the nature of the right some precautionary and stringent conditions should be applied before the doctrine is invoked or applied.

66. This leads me to the question whether the fundamental rights enshrined in the Indian Constitution pertain to that category of rights which could be waived. To put it differently, whether the Constitutional guarantee in regard to the fundamental rights restricts or ousts the jurisdiction of the relevant authorities under the Constitution to make laws in derogation of the said rights or whether the said rights are for the benefit of the general public. At the outset I would like to sound a note of warning. While it is true that the judgments of the Supreme Court of the United States are of a great assistance to this Court in elucidating and solving the difficult problems that arise from time to time, it is equally necessary to keep in mind the fact that the decisions are given in the context of a different social, economic and political set up, and therefore great care should be bestowed in applying those decisions to cases arising in India with different social, economic and political conditions. While the principles evolved by the Supreme Court of the United States of America may in certain circumstances be accepted, their application to similar facts in India may not always lead to the same results. It is therefore necessary to consider the nature of the fundamental rights incorporated in the Indian Constitution, the conditions of the people for whose benefit and the purpose for which they were created, and the effect of the laws made in violation of those rights. The Constitution of India in its Preamble promises to secure to all citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the unity of the nation. One of the things the Constitution did to achieve the object is to incorporate the fundamental rights in the Constitution. They are divided into seven categories: (i) right to equality — Articles 14 to 18; (ii) right to freedom — Articles 19 to 22; (iii) right against exploitation — Articles 23 and 24; (iv) right to freedom of religion — Articles 25 to 28; (v) cultural and educational rights — Articles 29 and 30; (vi) right to property — Articles 31, 31-A and 31-B; and (vii) right to constitutional remedies — Articles 32 to 35. Patanjali Sastri, J., as he then was, pointed out, in *Gopalan v. State of Madras*⁵² that fundamental rights contained in Part III of the Constitution are really rights that are still reserved to the people after the delegation of rights by the people to the institutions of Government both at the Centre and in the States created by the Constitution. Article 13 reads:

“(1) All laws in force in the territory of India immediately before the commencement of this Constitution, insofar as they are inconsistent with the provisions of this Part, shall, to the extent of such inconsistency, be void.

(2) The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause, shall, to the

extent of the contravention, be void."

This article, in clear and unambiguous terms, not only declares that all laws in force before the commencement of the Constitution and made thereafter taking away or abridging the said rights would be void to the extent of the contravention but also prohibits the State from making any law taking away or abridging the said rights. Part III is therefore enacted for the benefit of all the citizens of India, in an attempt to preserve to them their fundamental rights against infringement by the institutions created by the Constitution; for, without that safeguard, the objects adumbrated in the Constitution could not be achieved. For the same purpose, the said chapter imposes a limitation on the power of the State to make laws in violation of those rights. The entire part, in my view, has been introduced in public interest, and it is not proper that the fundamental rights created under the various articles should be dissected to ascertain whether any or which part of them is conceived in public interest and which part of them is conceived for individual benefit. Part III reflects the attempt of the Constitution-makers to reconcile individual freedom with State control. While in America this process of reconciliation was allowed to be evolved by the course of judicial decisions, in India, the fundamental rights and their limitations are crystallized and embodied in the Constitution itself; while in America a free hand was given to the judiciary not only to evolve the content of the right but also its limitations, in the Indian Constitution there is not much scope for such a process. The court cannot therefore import any further limitations on the fundamental rights other than those contained in Part III by any doctrine, such as "waiver" or otherwise. I would, therefore, hold that the fundamental rights incorporated in Part III of the Constitution cannot be waived.

67. It is said that such an inflexible rule would, in certain cases, defeat the very object for which the fundamental rights are created. I have carefully scrutinized the articles in Part III of the Constitution of India, and they do not, in my view, disclose any such anomaly or create unnecessary hardship to the people for whose benefit the rights are created. Article 14 embodies the famous principle of equality before the law and equal protection of the laws, and Articles 15 to 18 and Article 29(2) relate to particular applications of the rule. The principle underlying these articles is the mainspring of our democratic form of Government and it guarantees to its citizens equal protection in respect of both substantive and procedural laws. If the doctrine of waiver is engrafted to the said fundamental principles, it will mean that a citizen can agree to be discriminated. When one realizes the unequal positions occupied by the State and the private citizen, particularly in India where illiteracy is rampant, it is easy to visualize that in a conflict between the State and a citizen, the latter may, by fear of force or hope of preferment, give up his right. It is said that in such a case coercion or influence can be established in a court of law, but in practice it will be well nigh impossible to do so. The same reasoning will apply to Articles 15 and 16. Article 17 illustrates the evil repercussion of the doctrine of waiver in its impact on the fundamental rights. That article in express terms forbids untouchability; obviously, a person cannot ask the State to treat him as an untouchable. Article 19 reads:

"(i) All citizens shall have the right—

(a) to freedom of speech and expression;

(b) to assemble peaceably and without arms;

- (c) to form associations or unions;
- (d) to move freely throughout the territory of India;
- (e) to reside and settle in any part of the territory of India;
- (f) to acquire, hold and dispose of property; and
- (g) to practice any profession, or to carry on any occupation, trade or business."

The right to freedom is the essential attribute of a citizen under democratic form of Government. The freedoms mentioned in Article 19 are subject to certain restrictions mentioned in clauses (2) to (6) of that article. So far as the freedoms narrated in sub-clauses a to (g) of clause (1) of Article 19 are concerned, I cannot visualize any contingency where a citizen would be in a worse position than he was if he could not exercise the right of waiver. In regard to freedom to acquire, hold and dispose of property, a plausible argument may be advanced, namely, that a citizen should have a right to waive his right to acquire, hold and dispose of property; for, otherwise he might be compelled to acquire and hold his property, even if he intended to give it up! There is an underlying fallacy in this argument. The article does not compel a citizen to acquire, hold and dispose of property just as it does not compel a person to do any of the acts covered by the other freedoms. If he does not want to reside in any part of the territory of India or to make a speech or to practise any profession, he is at liberty not to do any of these things. So too, a person may not acquire the property at all or practise any profession but if he seeks to acquire property or practise any profession, he cannot be told that he has waived his right at an earlier stage to acquire property or practise the profession. A freedom to do a particular act involves the freedom not to do that act. There is an essential distinction between the non-exercise of a right and the exercise of a right subject to the doctrine of waiver. So understood, even in the case of the right covered by sub-clauses (f) of clause (1), there cannot be any occasion when a citizen would be worse off than when he had no fundamental rights under the article. The preservation of the rights under Article 19 without any further engrafting of any limitations than those already imposed under the Constitution, is certainly in the interest of the public; for, the rights are essential for the development of human personality in its diverse aspects. Some comment is made in regard to the right covered by clause (3) of Article 20, and it is asked that if a person has no liberty to waive the protection under that clause, he could not give evidence even if he wanted to give it in his own interest. This argument ignores the content of the right under clause (3) of Article 20. The fundamental right of a person is only that he should not be compelled to be a witness against himself. It would not prevent him from giving evidence voluntarily. Under Article 21, no person shall be deprived of his life or personal liberty except according to procedure established by law and Article 22 gives protection against arrest and detention in certain cases. I do not think that any situation can be conceived when a person could waive this right to his advantage. Article 23(1) prohibits traffic in human beings and forced labour. It is not suggested that a person can waive this constitutional protection. So too, the right under Article 24, which prohibits employment of children in factories, cannot be waived. That apart, so far as this article is concerned, no question of waiver can arise as a child cannot obviously waive his right under this article. Article 25 gives guarantee for religious liberty subject to certain restrictions contained therein. It declares that all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion. This right is certainly conceived in the public interest and cannot

be waived. So too, freedom to manage religious affairs, freedom as to payment of taxes for promotion of any particular religion and freedom as to attendance at religious instruction or religious worship in certain educational institutions are all conceived to enforce the religious neutrality of the State and it cannot be suggested that they are not in public interest. The cultural and educational rights of the minorities and their right to establish and administer educational institutions of their choice are given for the protection of the rights of the minorities and it cannot be said that they are not in public interest. Article 31, which prohibits the State from depriving a person of his property save by authority of law or to acquire any property without paying compensation, is intended to protect the properties of persons from arbitrary actions of the State. This article is conceived in the interest of the public and a person cannot say that he can be deprived of his property without authority of law or that his land can be acquired without compensation.

68. It is suggested that if a person, after waiving his fundamental right to property and allowing the State to incur heavy expenditure in improving the same, turns round and claims to recover the said property, the State would be put to irreparable injury. Firstly, no such occasion should arise, as the State is not expected to take its citizens' property or deprive them of their property otherwise than by authority of law. Secondly, if the owner of a property intends to give it to the State, the State can always insist upon conveying to it the said property in the manner known to law. Thirdly, other remedies may be open to the State — on that I am not expressing any opinion — to recover compensation or damages for the improvements bona fide made or the loss incurred, having regard to the circumstances of a particular case. These considerations, in my view, are of no relevance in considering the question of waiver in the context of fundamental rights. By express provisions of the Constitution, the State is prohibited from making any law which takes away or abridges the rights conferred by Part III of the Constitution. The State is not, therefore, expected to enforce any right contrary to the constitutional prohibition on the ground that the party waived his fundamental right. If this prohibition is borne in mind, no occasion can arise when the State would be prejudiced. The prejudice, if any, to the State would be caused not by the non-application of the doctrine of waiver but by its own action contrary to the constitutional prohibition imposed on it.

69. It is then said that if the doctrine of waiver is to be excluded, a person can apply to the Supreme Court under Article 32 of the Constitution for the relief provided therein, withdraw the petition, get the order of the Supreme Court dismissing it and then apply over again for issue of a writ in respect of the same right. The apprehension so expressed is more imaginary than real; for, it has no foundation either in fact or in law. When an application is dismissed, for whatever reason it may be whether on merits or on admission — the order of the court becomes final and it can be reopened only in the manner prescribed by law. There is no scope for the application of the doctrine of waiver in such a case.

70. Articles 33 and 34 contain some of the constitutional limitations on the application and the enforcement of the fundamental rights. The former article confers power on Parliament to modify the rights conferred by Part III of the Constitution in their application to facts and the latter enables it to impose restrictions on the rights conferred by that Part, while martial law is in force in any area.

71. These two articles, therefore, do not create fundamental rights, but impose limitations thereon and I cannot appreciate the argument that their presence in Part

III either derogates from the content of the fundamental rights declared therein or sustains the doctrine of waiver in its application to the said rights. Article 35 confers on the Parliament, the power to legislate for giving effect to the provisions of Part III to the exclusion of the legislatures of the States. This article also does not create a fundamental right, but provides a machinery for enforcing that right.

72. A startling result, it is suggested, would flow from the rejection of the doctrine of waiver and the suggestion is sought to be illustrated by the following example: A person takes a permit for several years from the State for running a motor vehicle or an excise shop. Having enjoyed the benefit for several years and when action is proposed to be taken against him to terminate the licence, he contends that the law under which the permit was granted to him offended his fundamental rights and therefore constitutionally not valid. It is asked whether it would be open to him to say that the very Act under which the permit was granted to him was not valid in law. To my mind, this illustration does not give rise to any anomaly. Either a person can run a motor vehicle or an excise shop with licence or without licence. On the basis the law is valid, a licence is taken and the motor vehicle is run under that licence and if that law offends his fundamental right and therefore void, he continues to run the business without licence, as no licence is required under a valid law. The aforesaid illustration does not, therefore, give rise to any anomaly and even if it does, it does not affect the legal position.

73. I have considered the various provisions relating to the fundamental rights with a view to discover if there is any justification for the comment that without the aid of the doctrine of waiver a citizen, in certain circumstances, would be in a worse position than that he would be if he exercised his right. I have shown that there is none. Nor is there any basis for the suggestion that the State would irreparably suffer under certain contingencies; for, any resulting hardship would be its own making and could be avoided if it acted in accordance with law.

74. A large majority of our people are economically poor, educationally backward and politically not yet conscious of their rights. Individually or even collectively, they cannot be pitted against the State organizations and institutions, nor can they meet them on equal terms. In such circumstances, it is the duty of this Court to protect their rights against themselves. I have, therefore, no hesitation in holding that the fundamental rights created by the Constitution are transcendental in nature, conceived and enacted in national and public interest, and therefore cannot be waived.

75. That apart, I would go further and hold that as Section 5(1) of the Act 3 of 1947 was declared to be void by this Court in *M.Ct. Muthiah v. CIT*⁵³ the appellant cannot, by the application of the doctrine of waiver, validate the enquiry made under the said Act. It is suggested that there is a distinction between a case where the enactment is beyond the legislative competence of the legislature which made it and the case where the law is unconstitutional on the ground of existence of a constitutional limitation, that while in the former case the law is null and void, in the latter case the law is unenforceable and may be revived by the removal of the limitation by an amendment of the Constitution. On this distinction an argument is sought to be built to the effect that as in the present case Section 5(1) of the Act 3 of 1947 was declared to be invalid only on the ground that it was hit by Article 14 of the Constitution, the law must be deemed to be on the statute-book and therefore the appellant was within his right to waive his constitutional guarantee. I am unable

to appreciate this argument.

76. The scope of Article 13(1) of the Constitution was considered by this Court in *Keshvan Madhava Menon v. State of Bombay*⁵⁴. This Court, by a majority, held that Article 13(1) of the Constitution does not make existing laws which are inconsistent with the fundamental rights, void ab initio, but only renders such laws unenforceable and void with respect to the exercise of the fundamental rights on and after the date of commencement of the Constitution. Mahajan, C.J., Who was a party to that decision, explained the word "void" in Article 13(1) of the Constitution in *Behram Khursheed Pesikaka v. State of Bombay*⁵⁵. He observed at p. 652 thus:

"It is axiomatic that when the law-making power of a State is restricted by written fundamental law, then any law enacted and opposed to the fundamental law is in excess of the legislative authority and is thus a nullity. Both these declarations of unconstitutionality go to the root of the power itself and there is no real distinction between them. They represent but two aspects of want of legislative power. The legislative power of Parliament and the State legislatures as conferred by Articles 245 and 246 of the Constitution stands curtailed by the fundamental rights chapter of the Constitution."

This decision in clear and unambiguous terms lays down that there cannot be any distinction on principle between constitutional incompetency and constitutional limitation. In either case, the Act is void, though in the latter case, the pre-constitutional rights and liabilities arising under the statute are saved. This Court again dealt with the meaning of the word "void" in *Bhikaji Narain Dhakras v. State of Madhya Pradesh*⁵⁶. There the question was whether an Act which was declared void on the ground of inconsistency with the Constitution, can be revived by any subsequent amendment to the Constitution removing the inconsistency. This Court answered the question in the affirmative. Das, acting C.J., observed at p. 598 thus:

"As explained in *Keshavan Madhava Menon case*⁵⁷, the law became void not in toto or for all purposes or for all times or for all persons but only 'to the extent of such inconsistency', that is to say, to the extent it became inconsistent with the provisions of Part III which conferred the fundamental rights on the citizens. It did not become void independently of the existence of the rights guaranteed by Part III....In short Article 13(1) had the effect of nullifying or rendering the existing law which had become inconsistent with Article 19(1)(g) read with clause (6) as it then stood ineffectual, nugatory and devoid of any legal force or binding effect only with the exercise of the fundamental right on and after the date of the commencement of the Constitution.... It is only as against the citizens that they remained in a dormant or moribund condition. In our judgment, after the amendment of clause (6) of Article 19 on 18th June 1951, the impugned Act ceased to be unconstitutional and became revived and enforceable against citizens as well as against non-citizens."

77. This judgment does not say anything different from that expressed in *Keshavan Madhava Menon case*⁵⁸ nor does it dissent from the view expressed by Mahajan, C.J., in *Behram Khursheed case*¹⁰. The problem that confronted the learned Judges was a different one and they resolved it by applying the doctrine of "eclipse". The legal position viz. that the law declared to be void either on the ground of legislative incompetency or for the reason of constitutional limitation, as stated in the earlier decisions, remains unshaken by this decision. So long as the inconsistency remains the law continues to be void, at any rate vis-a-vis the fundamental rights of a

person. We are not concerned in this case with the doctrine of revival; for the inconsistency of Section 5(1) of the Act with the fundamental right under Article 14 of the Constitution has not been removed by any amendment of the Constitution. So long as it is not done, the said section is void and cannot affect the fundamental rights of the citizens. In *M.Ct. Muthiah v. CIT*⁸ it was declared that Section 5(1) of Act 3 of 1947 was unconstitutional on the ground that it infringed the fundamental rights of the citizens under Article 14 of the Constitution. Under Article 141 of the Constitution, the law declared by the Supreme Court is binding on all the courts in India. It follows that the Income Tax Commissioner had no jurisdiction to continue the proceedings against the appellants under Act 3 of 1947. If the Commissioner had no jurisdiction, the appellants could not by waiving their right confer jurisdiction on him.

78. The scope of the doctrine of waiver was considered by this Court in *Behram Khurseed case*¹⁰. There a person was prosecuted for an offence under Section 66(b) of the Bombay Prohibition Act and he was sentenced to one month's rigorous imprisonment. One of the questions raised there was whether Section 13(b) of the Bombay Prohibition Act, having been declared to be void under Article 13(1) of the Constitution insofar as it affected the consumption or use of liquid medicinal or toilet preparation containing alcohol, the prosecution was maintainable for infringement of that section. The Court held that in India once the law has been struck down as unconstitutional by the Supreme Court, no notice can be taken of it by any court, because, after it is declared as unconstitutional, it is no longer law and is null and void. Even so, it was contended that the accused had waived his fundamental right and therefore he could not sustain his defence. Mahajan, C.J., delivering the judgment of the majority, repelled this contention with the following observations at p. 653:

"The learned Attorney-General when questioned about the doctrine did not seem to be very enthusiastic about it. Without finally expressing an opinion on this question we are not for the moment convinced that this theory has any relevancy in construing the fundamental rights conferred by Part III of our Constitution. We think that the rights described as fundamental rights are a necessary consequence of the declaration in the Preamble that the people of India have solemnly resolved to constitute India into a sovereign democratic republic and to secure to all its citizens justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity. These fundamental rights have not been put in the Constitution merely for the individual benefit though ultimately they come into operation in considering individual rights. They have been put there as a matter of public policy and the doctrine of waiver can have no application to provisions of law which have been enacted as a matter of constitutional policy. Reference to some of the articles, inter alia, Articles 15(1), 20, 21, makes the proposition quite plain. A citizen cannot get discrimination by telling the State 'You can discriminate', or get convicted by waiving the protection given under Articles 20 and 21."

On the question of waiver, Venkatarama Aiyar, J., in his judgment before review, considered the American decisions and was inclined to take the view that under our Constitution when a law contravenes the provisions intended for the benefit of the individual, it can be waived. But the learned Judge made it clear in his judgment that the question of waiver had no bearing to any issue of fact arising for determination in that case but only for showing the nature of the right declared

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under Article 19(1)(f) and the effect in law of a statute contravening it. Das, J., as he then was, in his dissenting judgment, did not state his view on this question but expressly reserved it in the following words:

"In coming to the conclusion that I have, I have in a large measure found myself in agreement with the views of Venkatarama Aiyar, J., on that part of the case. I, however, desire to guard myself against being understood to agree with the rest of the observations to be found in his judgment, particularly those relating to waiver of unconstitutionality, the fundamental rights being a mere check on the legislative power or the effect of the declaration under Article 13(1) being 'relatively void'. On those topics I prefer to express no opinion on this occasion."

I respectfully agree with the observations of Mahajan, C.J. For the aforesaid reasons, I hold that the doctrine of waiver has no application in the case of fundamental rights under our Constitution.

ORDER

79. The appeal is allowed. The order of the Income Tax Commissioner Delhi dated January 29, 1958 is set aside and all proceedings now pending for implementation of the order of Union Government dated July 5, 1954 are quashed. The appellant shall get costs of this appeal.

¹ (1955) 1 SCR 448

² (1955) 1 SCR 787

³ (1955) 2 SCR 1247

⁴ (1953) SCR 589

⁵ (1955) 1 SCR 613

⁶ L.R. (1931) AC 662

⁷ (1952) SCR 1112, 1120, 1121

⁸ 1957 SCR 874, 918

⁹ (1955) 1 SCR 769

¹⁰ (1955) 1 SCR 773

¹¹ (1954) 26 ITR 725

¹² AIR 1957 All 396

¹³ AIR 1958 Punj 294

¹⁴ (1955) 2 SCR 1247

¹⁵ (1955) 1 SCR 613

¹⁶ (1950) SCR 88

- ¹⁷ (1952) SCR 1112, 1120
- ¹⁸ (1957) SCR 874, 918
- ¹⁹ (1955) 1 SCR 773
- ²⁰ (1954) 26 ITR 725
- ²¹ (1955) 1 SCR 769
- ²² Civil Appeal No. 87 of 1957 decided on September 23, 1958
- ²³ (1955) 2 SCR 1247
- ²⁴ (1955) 1 SCR 448
- ²⁵ (1955) 1 SCR 787
- ²⁶ (1953) SCR 589
- ²⁷ (1951) SCR 228
- ²⁸ (1952) SCR 710
- ²⁹ (1955) 1 SCR 773
- ³⁰ (1954) 26 ITR 725
- ³¹ (1955) 1 SCR 769
- ³² (1958) 356 US 617, 619
- ³³ (1955) 1 SCR 613, 653, 654
- ³⁴ (1951) SCR 127
- ³⁵ (1935) LR 62 IA 100, 108
- ³⁶ (1955) 2 SCR 589
- ³⁷ (1957) SCR 874
- ³⁸ (1947) LR 74 IA 223, 228
- ³⁹ (1898) 171 US 641
- ⁴⁰ (1917) 244 US 407
- ⁴¹ (1922) 259 US 125
- ⁴² (1904) 194 US 553
- ⁴³ (1931) 284 US 141
- ⁴⁴ (1930) 281 US 276
- ⁴⁵ (1942) 317 US 269
- ⁴⁶ (1898) 43 L Ed 316 ; 171 US 641
- ⁴⁷ (1922) 66 L Ed 855 ; 259 US 125
- ⁴⁸ (1904) 48 L Ed 1115 ; 194 US 553

⁴⁹ (1930) 74 L Ed 854 ; 281 US 276

⁵⁰ (1942) 87 L Ed 268

⁵¹ (1931) 76 L Ed 210 ; 284 US 141

⁵² (1950) SCR 88

⁵³ (1955) 2 SCR 1247

⁵⁴ (1951) SCR 228

⁵⁵ (1955) 1 SCR 613

⁵⁶ (1955) 2 SCR 589

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1959 Supp (2) SCR 316:AIR 1959 SC 725

(Under Article 32 of the Constitution of India for enforcement of Fundamental Rights).

1. KAVALAPPARA KOTTARATHIL KOCHUNNI @ MOOPIL NAYAR(In Petition No. 443 of 55),
2. RAVUNNIARATH UNNIMALU AMMA @ . . Petitioners;
- DEVAKI AMMA AND OTHERS(In Petition No. 40 of 56) and
3. RAVUNNIARATH RAJAN MENON(In Petition No. 41 of 56)

Versus

STATE OF MADRAS AND OTHERS . . Respondents.

1. K.C. GOPALAN UNNI
2. THATHUNNI NAIR AND
3. P. KOCHUNNI RAJA . . Interveners.

Petitions Nos. 443 of 1955 and 40-41 of 1956, decided on 4th day of March, 1959

Present :

THE HON'BLE THE CHIEF JUSTICE SUDHI RANJAN DAS
THE HON'BLE JUSTICE N.H. BHAGWATI
THE HON'BLE JUSTICE BHUVANESHWAR PRASAD SINHA
THE HON'BLE JUSTICE K. SUBBA RAO
THE HON'BLE JUSTICE K.N. WANCHOO

For the Petitioners: M.C. Setalvad, Attorney-General for India and M.K. Nambiyar, Senior Advocate (J.B. Dadachanji, S.N. Andley and Rameshwar Nath, Advocates of Rajinder Narain & Co., with them).

For the State of Madras: T.M. Sen, Advocate.

For the State of Kerala: K.V. Suryanarayana Iyer, Advocate-General for the State of Kerala (T.M. Sen, Advocate, with him).

For Respondents 2-9: M.R. Krishna Pillai, Advocate.

For Respondent 12 in Petition Nos. 40 and 41 of 1956: Purshottam Tricumdas, Senior Advocate (M.R. Krishna Pillai, Advocate, with him).

For Respondents 11, 13-17 in Petition No. 443 of 55: K.R. Krishnaswami, Advocate.

For Respondent 12 in Petn. No. 443 of 55: Purshottam Tricumdas, Senior Advocate (K.R. Krishnaswami, Advocate, with him).

For Intervener 1: A.V. Viswanatha Sastri, Senior Advocate (M.R. Krishna Pillai, Advocate, with him).

For Intervener 2: Sardar Bahadur, Advocate.

For Intervener 3: M.R. Krishna Pillai, Advocate.

The Judgments of the Court were delivered by

DAS, C.J.—The circumstances leading upto the presentation of the above noted three

petitions under Article 32, which have been heard together, may be shortly stated:

2. In pre-British times the Kavalappara Moopil Nair, who was the senior-most male member of Kavalappara Swaroopam of dynastic family, was the Ruler of the Kavalappara territory situate in Walluvanad Taluk in the district of South Malabar. He was an independent prince or chieftain having sovereign rights over his territory and as such was the holder of the Kavalappara sthanam, that is to say, "the status and the attendant property of the senior Raja". Apart from the Kavalappara sthanam, which was a Rajasthanam, the Kavalappara Moopil Nair held five other sthanams in the same district granted to his ancestors by the superior overlord, the Raja of Palghat, as reward for military services rendered to the latter. He also held two other sthanams in Cochin granted to his ancestors by another overlord, the Raja of Cochin, for military services. Each of these sthanams has also properties attached to it and such properties belong to the Kavalappara Moopil Nair who is the sthanee thereof. On the death in 1925 of his immediate predecessor the petitioner in Petition No. 443 of 1955 became the Moopil Nair of Kavalappara and as such the holder of the Kavalappara sthanam to which is attached the Kavalappara estate and also the holder of the various other sthanams in Malabar and Cochin held by the Kavalappara Moopil Nair. The petitioner in Petition No. 443 of 1955 will hereafter be referred to as "the sthanee petitioner". According to him all the properties attached to all the sthanams belong to him and Respondents 2 to 17, who are the junior members of the Kavalappara family or tarwad, have no interest in them.

3. The Madras Marumkattayam Act (Mad. 22 of 1932) passed by the Madras Legislature came into force on August 1, 1933. This Act applied to tarwads and not to sthanams and Section 42 of the Act gave to the members of a Malabar tarwad a right to enforce partition of tarwad properties or to have them registered as impartible. In March 1934 Respondents 10 to 17, then constituting the entire Kavalappara tarwad, applied under Section 42 of the said Act for registration of their family as an impartible tarwad. In spite of the objection raised by the sthanee petitioner, the Sub Collector ordered the registration of the Kavalappara tarwad as impartible. The sthanee petitioner applied to the High Court of Madras for the issue of a writ to quash the order of the Sub-Collector, but the High Court declined to do so on the ground that the sthanee petitioner had no real grievance as the said order did not specify any particular property as impartible property. While this decision served the purpose of the sthanee petitioner, it completely frustrated the object of Respondents 10 to 17. On April 10, 1934, therefore, Respondents 10 to 17 filed OS No. 46 of 1934 in the Court of the Subordinate Judge of Ottapalam for a declaration that all the properties under the management of the defendant (meaning the sthanee petitioner) were tarwad properties belonging equally and jointly to the plaintiffs (meaning the respondents 10 to 17 herein) and the defendant i.e. the sthanee petitioner, and that the latter was in management thereof only as the Karnavan and manager of the tarwad. The sthanee petitioner contested the suit asserting that he was the Kavalappara Moopil Nair and as such a sthanee and that the properties belonged to him exclusively and that the plaintiffs (Respondents 10 to 17 herein) had no interest in the suit properties. By his judgment pronounced on February 26, 1938, the Subordinate Judge dismissed the OS No. 46 of 1934. The plaintiffs (the Respondents 10 to 17 herein) went up in appeal to the Madras High Court, which, on April 9, 1943, allowed the appeal and reversed the decision of the Subordinate Judge and decreed the suit. That judgment will be found reported in *Kuttan Unni v. Kochunni*¹. The defendant i.e. the sthanee petitioner herein carried the matter to the Privy Council and the Privy Council by its judgment, pronounced

on July 29, 1947, reversed the judgment of the High Court and restored the decree of dismissal of the suit passed by the Subordinate Judge. In the meantime in 1946 Respondents 10 to 17 had filed a suit (OS No. 77 of 1121) in the Cochin Court claiming similar reliefs in respect of the Cochin sthanam. After the judgment of the Privy Council was announced, Respondents 10 to 17 withdrew the Cochin suit. The matter rested here for the time being.

4. On February 16, 1953, Respondents 10 to 17 took the initiative again and presented a Memorial to the Madras Government asking that legislation be undertaken to reverse the Privy Council decision. The Government apparently did not think fit to take any action on that Memorial. Thereafter a suit was filed in the Court of the Subordinate Judge at Ottapalam by Respondents 2 to 9 who were then the minor members of the taward claiming Rs 4,23,000 as arrears of maintenance and Rs 44,000 as yearly maintenance for the future. The suit was filed in forma pauperis. There were some interlocutory proceedings in this suit for compelling the defendant (i.e. the sthanee petitioner) to deposit the amount of the maintenance into court which eventually came up to this Court by special leave but to which it is not necessary to refer in detail. During the pendency of that pauper suit, the sthanee petitioner, on August 3, 1955, executed two deeds of gift, one in respect of the Palghat properties in favour of his wife and two daughters who are the petitioners in Petition No. 40 of 1956 and the second in respect of the Cochin properties in favour of his son who is the petitioner in Petition No. 41 of 1956.

5. Meanwhile Respondents 2 to 17 renewed their efforts to secure legislation for the reversal of the decree of the Privy Council and eventually on August 8, 1955, procured a private member of the Madras Legislative Assembly to introduce a Bill (LA Bill No. 12 of 1955) intituled "The Madras Marumakkathayam (Removal of Doubts) Bill, 1955" with only two clauses on the allegation, set forth in the statement of objects and reasons appended to the Bill, that certain decisions of courts of law had departed from the age old customary law of Marumakkathayees with regard to sthanams and sthanam properties and that those decisions were the result of a misapprehension of the customary law which governed the Marumakkathayees from ancient times and tended to disrupt the social and economic structure of several ancient Marumakkathayam families in Malabar in that Karnavans of tarwad were encouraged to claim to be sthanees and thus deny the legitimate rights of the members of tarwads with the result that litigation had arisen or were pending. It was said to be necessary, in the interests of harmony and well being of persons following the Marumakkathayam law, that the correct position of customary law governing sthanams and sthanam properties should be clearly declared. This Bill came before the Madras Legislative Assembly on August 20, 1955, and was passed on the same day. The Bill having been placed before the Madras Legislative Council, the latter passed the same on August 24, 1955. The assent of the President to the Bill was obtained on October 15, 1955, and the Act intituled "the Madras Miirumakkathayam (Removal of Doubts) Act 1955" being Madras Act 32 of 1955 and hereinafter referred to as the impugned Act, was published in the Official Gazette on October 19, 1955. Section 1 of the impugned Act is concerned with the short title and its application. Section 2, which is material for our purposes, is expressed in the following terms:

"2. *Certain kinds of sthanam properties declared to be tarwad properties.*—

Notwithstanding any decision of court, any sthanam in respect of which—

(a) there is or had been at any time an intermingling of the properties of the sthanam and the properties of the tarwad or

(b) the members of the tarwad have been receiving maintenance from the properties purporting to be sthanam properties as of right, or in pursuance of a custom or otherwise, or

(c) there had at any time been a vacancy caused by there being no male member of the tarwad eligible to succeed to the sthanam, shall be deemed to be and shall be deemed always to have been a Marumakkathayam tarwad and the properties appertaining to such a sthanam shall be deemed to be and shall be deemed always to have been properties belonging to the tarwad to which the provisions of the Madras Marumakkathayam Act, 1932 (Madras Act 22 of 1933), shall apply.

Explanation.—All words and expressions used in this Act shall bear the same meaning as in the Madras Marumakkathayam Act, 1932 (Madras Act 22 of 1933)."

6. Almost immediately after the publication of the impugned Act in the gazette, Respondents 2 to 17 published notices in *Mathrubumi*, a Malayalam daily paper with large circulation in Malabar, Cochin and Travancore, to the effect that by reason of the passing of the impugned Act, Kavalappara, estate had become their tarwad properties and that rents could be paid to the sthanee petitioner only as the Karnavan of the properties and not otherwise. The notices further stated that the donees under the two deeds of gift executed by the sthanee petitioner were not entitled to the properties conveyed to them and should not be paid any rent at all. After the passing of the impugned Act one of the respondents filed another suit, also in forma pauperis, in the same court. It is also alleged by the petitioners that Respondents 2 to 17 are contemplating the filing of yet another suit for partition, taking advantage of the provisions of the impugned Act.

7. It was in these circumstances detailed above that the Kavalappara Moopil Nair i.e. the sthanee petitioner, on December 12, 1955, filed the present Petition No. 443 of 1955 under Article 32 of the Constitution. This was followed by Petition No. 40 of 1956 by his wife and two daughters and Petition No. 41 of 1956 by his son. Both the last mentioned petitions were filed on February 3, 1956. The first respondent in all the three petitions is the State of Madras and Respondents 2 to 17 are the members of the sthanee petitioner's tarwad. In his petition the sthanee petitioner prays "that a writ of Mandamus or any other proper writ, order or directions be ordered to issue for the purpose of enforcing his fundamental rights, directing the respondents to forbear from enforcing any of the provisions of the Madras Act 32 of 1955 against the petitioner, his Kavalappara sthanam and Kavalappara estate, declaring the said Act to be unconstitutional and invalid". The prayers in the other two petitions are mutatis mutandis the same.

8. Shri Purshottam Tricumdas appearing for some of the respondents has taken a preliminary objection as to the maintainability of the petitions. The argument in support of his objection has been developed and elaborated by him in several ways. In the first place, he contends that the petitions, insofar as they pray for the issue of a writ of mandamus, are not maintainable because the petitioners have an adequate remedy in that they can agitate the question now sought to be raised on these petitions and get relief in the pauper suit filed by one of the respondents after the passing of the impugned Act. This argument overlooks the fact that the present petitions are under Article 32 of the Constitution which is itself a guaranteed right.

In *Rashid Ahmed v. Municipal Board, Kairana*² this Court repelled the submission of the Advocate-General of Uttar Pradesh to the effect that, as the petitioner had an adequate legal remedy by way of appeal, this Court should not grant any writ in the nature of the prerogative writ of mandamus or certiorari and observed:

"There can be no question that the existence of an adequate legal remedy is a thing to be taken into consideration in the matter of granting writs, but the powers given to this Court under Article 32 are much wider and are not confined to issuing prerogative writs only."

Further, even if the existence of other adequate legal remedy may be taken into consideration by the High Court in deciding whether it should issue any of the prerogative writs on an application under Article 226 of the Constitution, as to which we say nothing now — this Court cannot, on a similar ground, decline to entertain a petition under Article 32, for the right to move this Court by appropriate proceedings for the enforcement of the rights conferred by Part III of the Constitution is itself a guaranteed right. It has accordingly been held by this Court in *Romesh Thappar v. State of Madras*³ that under the Constitution this Court is constituted the protector and guarantor of fundamental rights and it cannot, consistently with the responsibility so laid upon it, refuse to entertain applications seeking the protection of this Court against infringement of such rights, although such applications are made to this Court in the first instance without resort to a High Court having concurrent jurisdiction in the matter. The mere existence of an adequate alternative legal remedy cannot per se be a good and sufficient ground for throwing out a petition under Article 32, if the existence of a fundamental right and a breach, actual or threatened, of such right is alleged and is prima facie established on the petition.

9. The second line of argument advanced by learned counsel is that the violation of the right to property by private individuals is not within the purview of Article 19(1)(f) or Article 31(1) and that a person whose right to property is infringed by a private individual must, therefore, seek his remedy under the ordinary law and not by way of an application under Article 32. In support of this part of his argument, learned counsel relies on the decision of this Court in *P.D. Shamdasani v. Central Bank of India Ltd.*⁴ In that case the respondent Bank had, in exercise of its right of lien under its articles of association, sold certain shares belonging to the petitioner and then the latter started a series of proceedings in the High Court challenging the right of the Bank to do so. After a long lapse of time, after all those proceedings had been dismissed, the petitioner instituted a suit against the Bank challenging the validity of the sale of his shares by the Bank. The plaint was rejected by the court under Order 7 Rule 11(d) of the Code of Civil Procedure as barred by limitation. Thereupon the petitioner filed an application under Article 32 of the Constitution praying that all the adverse orders made in the previous proceedings be quashed and the High Court be directed to have "the above suit set down to be heard as undefended and pronounce judgment against the respondent or to make such orders as it thinks fit in relation to the said suit". It will be noticed that the petitioner had no grievance against the State as defined in Article 12 of the Constitution and his petition was not founded on the allegation that his fundamental right under Article 19(1)(f) or Article 31(1) had been infringed by any action of the State as so defined or by anybody deriving authority from the State. The present position is, however, entirely different, for the gravamen of the complaint of the sthanee petitioner and the other petitioners, who claim title from him, is directly against the impugned Act passed by the Madras Legislature, which is within the expression "State" as defined

in Article 12. Therefore in the cases now before us the petitions are primarily against the action of the State and Respondents 2 to 17 have been impleaded because they are interested in denying the petitioner's rights created in their favour by the impugned Act. Indeed by means of suits and public notices, those respondents have in fact been asserting the rights conferred upon them by the impugned Act. In these circumstances the petitioners' grievance is certainly against the action of the State which, by virtue of the definition of that term given in Article 12 of the Constitution, includes the Madras Legislature and it cannot certainly be said that the subject-matters of the present petitions comprise disputes between the private individuals unconnected with any State action. Clearly disputes are between the petitioners on the one hand and the State and persons claiming under the State or under a law made by the State on the other hand. The common case of the petitioners and the respondents, therefore, is that the impugned Act does affect the right of the petitioners to hold and enjoy the properties as *sthanam* properties; but, while the petitioners contend that the law is void, the respondents maintain the opposite view. In our opinion these petitions under Article 32 are not governed by our decision in *P.D. Shamdasani's case*¹ and we see no reason why, in the circumstances, the petitioners should be debarred from availing themselves of their constitutional right to invoke the jurisdiction of this Court for obtaining redress against infringement of their fundamental rights.

10. The third argument in support of the preliminary point is that an application under Article 32 cannot be maintained until the State has taken or threatens to take any action under the impugned law which action, if permitted to be taken, will infringe the petitioners' fundamental rights. It is true that the enactments abolishing estates contemplated some action to be taken by the State, after the enactments came into force, by way of issuing notifications, so as to vest the estates in the State and thereby to deprive the proprietors of their fundamental right to hold and enjoy their estates. Therefore, under those enactments some overt act had to be done by the State before the proprietors were actually deprived of their right, title and interest, in their estates. In cases arising under those enactments the proprietors could invoke the jurisdiction of this Court under Article 32 when the State did or threatened to do the overt act. But quite conceivably an enactment may immediately on its coming into force take away or abridge the fundamental rights of a person by its very terms and without any further overt act being done. The impugned Act is said to be an instance of such enactment. In such a case the infringement of the fundamental right is complete *eo instanti* the passing of the enactment and, therefore, there can be no reason why the person so prejudicially affected by the law should not be entitled immediately to avail himself of the constitutional remedy under Article 32. To say that a person, whose fundamental right has been infringed by the mere operation of an enactment, is not entitled to invoke the jurisdiction of this Court under Article 32, for the enforcement of his right, will be to deny him the benefit of a salutary constitutional remedy which is itself his fundamental right. The decisions of this Court do not compel us to do so. In *State of Bombay v. United Motors (India) Limited*² the petitioners applied to the High Court on November 3, 1952, under Article 226 of the Constitution challenging the validity of the Bombay Sales Tax Act, 1952 which came into force on November 1, 1952. No notice had been issued, no assessment proceeding had been started and no demand had been made on the petitioners for the payment of any tax under the impugned Act. It should be noted that in that petition one of the grounds of attack was that the Act required the dealers, on pain of penalty, to apply for registration in some cases and to obtain a license in some other cases as a condition

for the carrying on of their business, which requirement, without anything more, was said to have infringed the fundamental rights of the petitioners under Article 19(g) of the Constitution and no objection could, therefore, be taken to the maintainability of the application. Reference may also be made to the decision of this Court in *Himmatlal Harilal Mehta v. State of Madhya Pradesh*⁶. In that case, after cotton was declared, on April 11, 1949, as liable to sales tax under the Central Provinces and Berar Sales Tax Act, 1947, the appellant commenced paying the tax in respect of the purchases made by him and continued to pay it till December 31, 1950. Having been advised that the transactions done by him in Madhya Pradesh were not "sales" within that State and that consequently he could not be made liable to pay sales tax in that State, the appellant declined to pay the tax in respect of the purchases made during the quarter ending March 31, 1951. Apprehending that he might be subjected to payment of tax without the authority of law, the appellant presented an application to the High Court of Judicature at Nagpur under Article 226 praying for an appropriate writ or writs for securing to him protection from the impugned Act and its enforcement by the State. The High Court declined to issue a writ and dismissed the petition on the ground that a mandamus could be issued only to compel an authority to do or to abstain from doing some act and that it was seldom anticipatory and was certainly never issued where the action of the authority was dependent on some action of the appellant and that in that case the appellant had not even made his return and no demand for the tax could be made from him. Being aggrieved by that decision of the High Court, the petitioner in that case came up to this Court on appeal and this Court held that a threat by the State to realise the tax from the assessee without the authority of law by using coercive machinery of the impugned Act was a sufficient infringement of his fundamental right which gave him a right to seek relief under Article 226 of the Constitution. It will be noticed that the Act impugned in that case had by its terms made it incumbent on all dealers to submit returns etc. and thereby imposed restrictions on their fundamental right to carry on their businesses under Article 19(1)(g). The present case, however, stands on a much stronger footing. The sthaneer petitioner is the Kavalappara Moopil Nair and as such holds certain sthanams and the petitioners in Petitions Nos. 40 and 41 of 1956 derive their titles from him. According to the petitioners, the sthaneer petitioner was absolutely entitled to all the properties attached to all the sthanams and Respondents 2 to 17 had no right, title or interest in any of the sthanam properties. Immediately after the passing of the impugned Act, the Madras Marumakkathayam Act, 1932 became applicable to the petitioners' sthanams and the petitioners' properties became subject to the obligations and liabilities imposed by the last mentioned Act. On the passing of the impugned Act, the sthaneer petitioner immediately became relegated from the status of a sthaneer to the status of a Karnavan and manager and the sthanam properties have become the tarwad properties and Respondents 2 to 17 have automatically become entitled to a share in those properties along with the petitioners. The right, title or interest claimed by petitioners in or to their sthanam properties is, by the operation of the statute itself and without anything further being done, automatically taken away or abridged and the impugned Act has the effect of automatically vesting in Respondents 2 to 17 an interest in those properties as members of the tarwad. Indeed Respondents 2 to 17 are asserting their rights and have issued public notices on the basis thereof and have also instituted a suit on the strength of the rights created in them by the impugned Act. Nothing further remains to be done to infringe the petitioners' right to the properties as sthanam properties. It is true that the sthaneer petitioner or the other petitioners deriving title from him are still in possession of the sthanam properties, but in the eye of law they no longer possess the right of the sthaneer and

they cannot, as the sthanee or persons deriving title from the sthanee, lawfully claim any rent from the tenants. In view of the language employed in Section 2 quoted above and its effect the petitioners can legitimately complain that their fundamental right to hold and dispose of the sthanam properties has been injured by the action of the Legislature which is "state" as defined in Article 12 of the Constitution. In the premises, the petitioners are prima facie entitled to seek their fundamental remedy under Article 32.

11. The next argument in support of the objection as to the maintainability of these petitions is thus formulated: The impugned Act is merely a piece of a declaratory legislation and does not contemplate or require any action to be taken by the State or any other person and, therefore, none of the well known prerogative writs can afford an adequate or appropriate remedy to a person whose fundamental right has been infringed by the mere passing of the Act. If such a person challenges the validity of such an enactment, he must file a regular suit in a court of competent jurisdiction for getting a declaration that the law is void and therefore, cannot and does not effect his right. In such a suit he can also seek consequential reliefs by way of injunction or the like, but he cannot avail himself of the remedy under Article 32. In short, the argument is that the proceeding under Article 32 cannot be converted into or equated with a declaratory suit under Section 42 of the Specific Relief Act. Reference is made, in support of the aforesaid contention, to the following passage in the judgment of Mukherjea, J., as he then was, in the case of *Chiranjit Lal Chowdhuri v. Union of India*².

"As regards the other point, it would appear from the language of Article 32 of the Constitution that the sole object of the article is the enforcement of fundamental rights guaranteed by the Constitution. A proceeding under this article cannot really have any affinity to what is known as a declaratory suit."

But further down on the same page His Lordship said:

"Any way, Article 32 of the Constitution gives us very wide discretion in the matter of framing our writs to suit the exigencies of particular cases, and the application of the petitioner can not be thrown out simply on the ground that the proper writ or direction has not been prayed for."

It should be noted that though in that case the petitioner prayed, inter alia, for a declaration that the Act complained of was void under Article 13 of the Constitution it was not thrown out on that ground. The above statement of the law made by Mukherjea, J. is in accord with the decision of this Court in the earlier case of *Rashid Ahmed v. Municipal Board, Kairana*². The passage from our judgment in that case, which has already been quoted above, also acknowledges the powers given to this Court by Article 32 are much wider and are not confined to the issuing of prerogative writs only. The matter does not rest there. In *T.C. Basappa v. T. Nagappa*³ Mukherjea, J. again expressed the same view: (p. 256).

"The language used in Articles 32 and 226 of our Constitution is very wide and the powers of the Supreme Court as well as of all the High Courts in India extend to issuing of orders, writs or directions including writs in the nature of habeas corpus, mandamus, quo warranto, prohibition and certiorari as may be considered necessary for enforcement of the fundamental rights and in the case of the High Courts, for other purposes as well. In view of the express provisions of our Constitution we need

not now look back to the early history or the procedural technicalities of these writs in English law, nor feel oppressed by any difference or change of opinion expressed in particular cases by English Judges."

In *Ebrahim Vazir Mayat v. State of Bombay*² the order made by the majority of this Court was framed as follows:

"As a result of the foregoing discussion we declare Section 7 to be void under Article 31(1) insofar as it conflicts with the fundamental right of a citizen of India under Article 19(1)(e) of the Constitution and set it aside. The order will, however, operate only upon proof of the fact that the appellants are citizens of India. The case will, therefore, go back to the High Court for a finding upon this question. It will be open to the High Court to determine this question itself or refer it to the Court of District Judge for a finding."

That was a case of an appeal coming from a High Court and there was no difficulty in remanding the case for a finding on an issue, but the fact to note is that this Court did make a declaration that Section 7 of the Act was void. We are not unmindful of the fact that in the case of *Maharaj Umeg Singh v. State of Bombay*¹⁰ which came up before this Court on an application under Article 32, the petitioner had been relegated to filing a regular suit in a proper court having jurisdiction in the matter. But on a consideration of the authorities it appears to be well established that this Court's powers under Article 32 are wide enough to make even a declaratory order where that is the proper relief to be given to the aggrieved party. The present case appears to us precisely to be an appropriate case, if the impugned Act has taken away or abridged the petitioners' right under Article 19(1)(f) by its own terms and without anything more being done and such infraction cannot be justified. If, therefore, the contentions of the petitioners be well founded, as to which we say nothing at present, a declaration as to the invalidity of the impugned Act together with the consequential relief by way of injunction restraining the respondents and in particular Respondents 2 to 17 from asserting any rights under the enactment so declared void will be the only appropriate reliefs which the petitioners will be entitled to get. Under Article 32 we must, in appropriate cases, exercise our discretion and frame our writ or order to suit the exigencies of this case brought about by the alleged nature of the enactment we are considering. In a suit for a declaration of their titles on the impugned Act being declared void, Respondents 2 to 17 will certainly be necessary parties, as persons interested to deny the petitioners' title. We see no reason why, in an application under Article 32 where declaration and injunction are proper reliefs, Respondents 2 to 17 cannot be made parties. In our opinion, therefore, there is no substance in the argument advanced by learned counsel on this point.

12. The last point urged in support of the plea as to the non-maintainability of these applications is that this Court cannot, on an application under Article 32, embark upon an enquiry into disputed question of fact. The argument is developed in this way. In the present case the petitioners allege, inter alia, that the impugned Act has deprived them of their fundamental right to the equal protection of the law and equality before the law guaranteed by Article 14 of the Constitution. Their complaint is that they have been discriminated against in that they and their sthanam properties have been singled out for hostile treatment by the Act. The petitioners contend that there is no other sthanam which comes within the purview of this enactment and that they and the sthanams held by them are the only target against

which this enactment is directed. The respondents, on the other hand, contend that the language of Section 2 is wide and general and the Act applies to all sthanams to which one or more of the conditions specified in Section 2 may be applicable and that this Court cannot, on an application under Article 32, look at any extraneous evidence but must determine the issue on the terms of the enactment alone and that in any event this Court cannot go into disputed questions of fact as to whether there are or are not other sthanams or sthanams similarly situate as the petitioners are. In support of his contention Shri Purshottam Tricumdas refers us to some decisions where some of the High Courts have declined to entertain applications under Article 226 of the Constitution involving disputed questions of fact and relegated the petitioners to regular suits in courts of competent jurisdiction. We are not called upon, on this occasion, to enter into a discussion or express any opinion as to the jurisdiction and power of the High Courts to entertain and to deal with applications under Article 226 of the Constitution where disputed questions of fact have to be decided and we prefer to confine our observations to the immediate problem now before us, namely, the limits of the jurisdiction and power of this Court when acting under Article 32 of the Constitution. Shri Purshottam Tricumdas concedes that the petitioners have the fundamental right to approach this Court for relief against infringement of their fundamental right. What he says is that the petitioners have exercised that fundamental right and that this fundamental right goes no further. In other words he maintains that nobody has the fundamental right that this Court must entertain his petition or decide the same when disputed questions of fact arise in the case. We do not think that that is a correct approach to the question. Clause (2) of Article 32 confers power on this Court to issue directions or orders or writs of various kinds referred to therein. This Court may say that any particular writ asked for is or is not appropriate or it may say that the petitioner has not established any fundamental right or any breach thereof and accordingly dismiss the petition. In both cases this Court decides the petition on merits. But we do not countenance the proposition that, on an application under Article 32, this Court may decline to entertain the same on the simple ground that it involves the determination of disputed questions of fact or on any other ground. If we were to accede to the aforesaid notification of learned counsel, we would be failing in our duty as the custodian and the fundamental rights. We are not unmindful of the fact that the view that this Court is bound to entertain a petition under Article 32 and to decide the same on merits may encourage litigants to file many petitions under Article 32 instead of proceeding by way of a suit. But that consideration cannot, by itself, be a cogent reason for denying the fundamental right of a person to approach this Court for the enforcement of his fundamental right which may, prima facie, appear to have been infringed. Further, questions of fact can and very often are dealt with on affidavits. In *Chiranjitlal Chowdhuri case*⁶ this Court did not reject the petition in limine on the ground that it required the determination of disputed questions of fact as to there being other companies equally guilty of mismanagement. It went into the facts on the affidavits and held, inter alia, that the petitioner had not discharged the onus that lay on him to establish his charge of denial of equal protection of the laws. That decision was clearly one on merits and is entirely different from a refusal to entertain the petition at all. In *Kathi Raning Rawat v. State of Saurashtra*¹¹ the application was adjourned in order to give the respondent in that case an opportunity to adduce evidence before this Court in the form of an affidavit. An affidavit was filed by the respondent setting out facts and figures relating to an increasing number of incidents of looting, robbery, dacoity, nose cutting and murder by marauding gangs of dacoits in certain areas of the State in support of the claim of the respondent State that "the security of the State and

public peace were jeopardised and that it became impossible to deal with the offences that were committed in different places in separate courts of law expeditiously". This Court found no difficulty in dealing with that application on evidence adduced by affidavit and in upholding the validity of the Act then under challenge. That was also a decision on merits although there were disputed questions of fact regarding the circumstances in which the impugned Act came to be passed. There were disputed questions of fact also in the case of *Ramkrishna Dalmia v. Justice S.R. Tendolkar*¹². The respondent State relied on the affidavit of the Principal Secretary to the Finance Ministry setting out in detail the circumstances which lead to the issue of the impugned notification and the matters recited therein and the several reports referred to in the said affidavit. A similar objection was taken by learned counsel for the petitioners in that case as has now been taken. It was urged that reference could not be made to any extraneous evidence and that the basis of classification must appear on the face of the notification itself and that this Court should not go into disputed questions of fact. This Court overruled that objection and held that there could be no objection to the matters brought to the notice of the Court by the affidavit of the Principal Secretary being taken into consideration in order to ascertain whether there was any valid basis for treating the petitioners and their companies as a class by themselves. As we have already said, it is possible very often to decide questions of fact on affidavits. If the petition and the affidavits in support thereof are not convincing and the court is not satisfied that the petitioner has established his fundamental right or any breach thereof, the Court may dismiss the petition on the ground that the petitioner has not discharged the onus that lay on him. The court may, in some appropriate cases, be inclined to give an opportunity to the parties to establish their respective cases by filing further affidavits or by issuing a commission or even by setting the application down for trial on evidence, as has often been done on the original sides of the High Courts of Bombay and Calcutta, or by adopting some other appropriate procedure. Such occasions will be rare indeed and such rare cases should not, in our opinion, be regarded as a cogent reason for refusing to entertain the petition under Article 32 on the ground that it involves disputed questions of fact.

13. For reasons given above we are of opinion that none of the points urged by learned counsel for the respondents in support of the objection to the maintainability of these applications can be sustained. These applications will, therefore, have to be heard on merits and we order accordingly. The respondents represented by Shri Purshottam Tricumdas must pay one set of costs of the hearing of this preliminary objection before us to the petitioners.

WANCHOO, J.— I have read the judgment just delivered by My Lord the Chief Justice, with which my other Brethren concur, with great care. With the utmost respect for My Brethren for whom I have the highest regard, I must state that if these applications were based only on the infringement of Article 14 of the Constitution, I would have no hesitation in dismissing them as not maintainable. I need not elaborate my reasons in this case and shall content myself by observing that where the law, as in this case, is general in terms and there is no question of its direct enforcement by the State in the form, for example, of grant of licences, issue of notices, submission of returns, and so on, actually resulting in wholesale abuse of its provisions, this Court will not permit an applicant under Article 32 to lead evidence to show that the law was meant to hit him alone. However, the applicants also rely on the infringement of the fundamental right guaranteed under Article 19(1) (f). As to that, I have doubts whether an application under Article 32 challenging a

general law of this kind, which affects one or other of the fundamental rights guaranteed under Article 19, can be maintained, in the absence of any further provision therein for direct enforcement of its provisions by the State in the form already indicated above, by a person who merely apprehends that he might in certain eventualities be affected by it. However, on the present occasion, I do not propose to press my doubts to the point of dissent and therefore concur with the proposed order.

¹ 1943 ILR 1944 Mad. 515

² 1950 SCR 566.

³ 1950 SCR 594

⁴ 1952 SCR 391

⁵ 1953 SCR 1069

⁶ 1954 SCR 1122

⁷ 1950 SCR 869, 900.

⁸ 1955 1 SCR 250, 256

⁹ 1954 SCR 933, 941.

¹⁰ 1955 2 SCR 164

¹¹ 1952 SCR 435

¹² Supreme Court Civil Appeals Nos. 455-457 and 656-658 of 1957, decided on March 28, 1958.

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(1962) 1 SCR 827: AIR 1962 SC 110

Appeal from the Judgment and Order dated 5th October, 1956, of the Patna.
High Court in Miscellaneous Appeal No. 367 of 1953.

STATE OF BIHAR . . Appellant;

Versus

KARAM CHAND THAPAR & BROTHERS LTD. . . Respondents.

Civil Appeal No. 209 of 1959, decided on 7th day of April, 1961.

Present:

THE HON'BLE JUSTICE S.K. DAS

THE HON'BLE JUSTICE J.L. KAPUR

THE HON'BLE JUSTICE M. Hidayatullah

THE HON'BLE JUSTICE J.C. SHAH

THE HON'BLE JUSTICE T.L. VENKATARAMA AYYAR

For the Appellant: L.K. Jha, Senior Advocate (R.C. Prasad, Advocate, with him).

For the Respondents: M.C. Setalvad, Attorney-General for India, N. De, Senior Advocate (P.K. Mukherjee, Advocate, with them).

The Judgment of the Court was delivered by

VENKATARAMA AYYAR, J.— This is an appeal against the Judgment of the High Court of Patna in an appeal under the Arbitration Act, 1940. The appellant is the State of Bihar, and the respondents are a company registered under the Indian Companies Act, doing business as building contractors. They entered into three contracts for the construction of aerodrome, hangar, buildings, stores and other works at Ranchi, the first of them being Contract No. 21 of 1942 dated November 5, 1942, and the other two being Contracts Nos. 6 and 8 dated April 5, 1943. After the above works were completed, disputes arose between the parties over the bills and eventually by an agreement dated February 6, 1948, they were referred to the arbitration of one Col. AWS. Smith. The arbitrator made his award on June 4, 1948, and sent a copy thereof to the parties. The respondents thereupon filed a petition under Sections 17 and 20 of the Indian Arbitration Act, 1940, for a decree in terms of the award. The appellant filed objections thereto, and the petition was then registered as Title Suit No. 53 of 1951. While this suit was pending, the arbitrator who had meantime left for Hong Kong sent to the Court of the Additional Subordinate Judge of Ranchi before whom the suit was pending a copy of the award duly signed by him, for being filed as provided in the Act. Notices were issued by the court under Section 14(2) of the Act, and, in answer thereto, the appellant filed an application to set aside the award on various grounds. To this, the respondents filed their reply statement. In view of this application, the respondents did not press their petition under Sections 17 and 20 of the Arbitration Act, which was in consequence dismissed, and the proceedings which commenced with the receipt of the award from the arbitrator were continued as Title Suit No. 53 of 1951. After an elaborate trial the Additional Subordinate Judge, Ranchi, passed a decree in terms of the award except as to a part which he held to be in excess of the claim. The appellant took the matter in

appeal to the High Court of Patna which confirmed the decree of the Subordinate Judge but granted a certificate under Articles 132 and 133(1) of the Constitution, and hence this appeal.

2. Though the controversy between the parties ranged in the courts below over a wide area, before us, it was restricted to two questions —whether there was a valid agreement of reference to arbitration binding on the Government and whether a decree could be passed on the unstamped copy of the award filed in the court. On the first question, the appellant contends that the agreement for reference to arbitration does not comply with the requirements of Section 175(3) of the Government of India Act, 1935, which was the Constitutional provision in force at the relevant date, and it is therefore void, that the award passed in proceedings founded thereon is a nullity and that no decree could be passed in terms thereof. Section 175(3) is as follows:

"Subject to the provisions of this Act with respect to the Federal Railway authority, all contracts made in the exercise of the executive authority of the Federation or of a province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise."

Under this section, a contract entered into by the Governor of a Province must satisfy three conditions. It must be expressed to be made by the Governor; it must be executed; and the execution should be by such persons and in such manner as the Governor might direct or authorise. We have now to examine whether the agreement to refer to arbitration dated February 6, 1948, satisfies the above conditions. It is expressed to be made between the Governor of Bihar and the respondents. It is also a formal document executed by one YK Lall, Executive Engineer, Ranchi Division, and by the respondents. So the only point that remains for consideration is whether the Executive Engineer was a person who was directed or authorised by the Governor to execute the agreement in question. The appellant contends that he was not, and relies in support of his contention on a notification dated April 1, 1937, issued by the Government of Bihar. That notification, in so far as it is material, is as follows:

"In exercise of the powers conferred by sub-section (3) of Section 175 of the Government of India Act, 1935, the Governor of Bihar is pleased, in supersession of all existing orders, to direct that the undermentioned classes of deeds, contracts and other instrument may be executed on his behalf as follows:

A. In the case of the Public Works Department (subject to any limit fixed by Departmental orders).

2. All instruments relating to the execution of works of all kinds connected with buildings, bridges, roads canals, tanks, reservoirs, docks and harbours and embankments, and also

By Secretaries to
Government, Chief Engineers,
Superintending Engineers,
Divisional Officers, Sub-

instruments relating to the construction of water works, sewage works, the erection of machinery, and the working of coal mines,

Divisional Officers Assistant or Assistant Executive Engineers, and the Electric Inspector.

12. All deeds and instruments relating to any matters other than those specified in heads 1 to 11.

By Secretaries and Joint Secretaries to Government."

There was a discussion in the courts below as to whether the present agreement fell within Item 2 or Item 12. If the agreement could be held to be an instrument relating to the execution of works, it would fall within Item 2, and the Executive Engineer would be a person authorised under this notification to enter into this contract, but if it does not fall within that item, it must fall within Entry 12, in which case he would not be competent to execute the agreement. Both the courts below have held that the agreement to refer to arbitration was not one relating to execution of works as that had been completed and the dispute related only to payment of the bills, and that further the essential feature of an arbitration agreement was the constitution of a private Tribunal and it could not therefore be brought within Item 2 and that accordingly it fell within Item 12. But the learned Judges of the High Court were also of the opinion that YK Lall, the Executive Engineer had in fact been specifically authorised to execute the arbitration agreement, and that that was sufficient for the purpose of Section 175(3). The appellant impugns the correctness of this conclusion and contends that it is not warranted by the record. It becomes, therefore, necessary to refer in some detail to the correspondence bearing on this point. On July 26, 1947, Mr Murrel, Secretary to the Government, wrote to Col. Smith as follows:

"I am directed to say that the Government of Bihar propose to appoint you as Arbitrator for the settlement of a claim put forth by Messrs. Karam Chand Thapar and Brothers Limited in connection with the construction of the Hinoo Aerodrome at Ranchi — Job 108 If you agree to undertake the work, ... the necessary forms of acceptance of appointment of Arbitrator etc. may please be forwarded to this Department for completion by the Government of Bihar and by the Contractor."

To this, Col. Smith sent a reply agreeing to act as arbitrator. In that later he also suggested that the contract between the parties might be suitably amended so as to permit arbitration. This is significant, because under clause 23 of the contract, all disputes between the parties had to be referred to the Superintending Engineer whose decision was to be final, and if that had been amended as suggested, the arbitration clause would have become part of the original contract and there would have been no occasion for the present contention. Referring to the above suggestion for amending the agreement, the Secretary, Mr Murrel, wrote on September 5, 1947, to Col. Smith that the opinion of the Legal Remembrancer would have to be got. On January 19, 1948, Col. Smith wrote to the Secretary that he was ready to take up his duties as arbitrator and again desired that the contract should be amended so as to provide for arbitration. On January 27, 1948, the Secretary to the Government informed Col. Smith that opinion had been received from the Legal Remembrancer that an agreement for arbitration should be executed in accordance with the

provisions of the Arbitration Act and that a "draft agreement (copy enclosed) has been drawn up accordingly and steps are being taken to execute it as quickly as possible". On the same date, the Executive Engineer wrote to the respondents as follows:

"It has since been decided by Government to determine your claims in connection with the above through arbitration conducted in accordance with the provisions of the Arbitration Act 1 of 1940. You are therefore requested to please attend the Divisional Office immediately to execute necessary agreement for the purpose."

Pursuant to this letter, the respondents joined in the execution of the agreement dated February 6, 1948, along with the Executive Engineer for referring the dispute to arbitration. On February 25, 1948, the Secretary informed the arbitrator that the draft agreement had been slightly modified in consultation with the Government Pleader, and he also wrote to the Executive Engineer that certain formal corrections should be made in the agreement and signed by both the parties. And that was done.

3. Having carefully gone through the correspondence, we agree with the learned Judges of the High Court that the Executive Engineer had been authorised by the Governor acting through his Secretary to execute the agreement for reference to arbitration. It will be seen that it was the Secretary who from the very inception took the leading part in arranging for arbitration. He was throughout speaking in the name of and on behalf of the Government and he did so "as directed". The subject-matter of the arbitration was a claim which concerned the Government. The proposal at the earlier stages to amend clause 23 of the original contract so as to include an arbitration shows that the intention of the parties was to treat the agreement for arbitration as part and parcel of that contract. Even after the agreement was executed, the Secretary made corrections and modifications in the agreement on the basis that it was the Government that was a party thereto. The conclusion from all this is, in our judgment, irresistible that YK Lall, the Executive Engineer had been authorised to execute the agreement dated February 6, 1948.

4. It was suggested that the Secretary was possibly labouring under a mistaken notion that the agreement to refer to arbitration was covered by Item 2 and acting under that misconception he directed YK Lall to execute the agreement. Even if that were so, that would not make any difference in the position, because the Secretary undoubtedly did intend that YK Lall should execute the agreement and that is all that is required under Section 175(3).

5. It was further argued for the appellant that there being a Government notification of a formal character, we should not travel outside it and find authority in a person who is not authorised thereunder. But Section 175(3) does not prescribe any particular mode in which authority must be conferred. Normally, no doubt, such conferment will be by notification in the Official Gazette, but there is nothing in the section itself to preclude authorisation being conferred ad hoc on any person, and when that is established, the requirements of the section must be held to be satisfied. In the result, we hold that the agreement dated February 6, 1948, was executed by a person who was authorised to do so by the Governor, and in consequence there was a valid reference to arbitration.

6. It is next contended that as the copy of the award in court was unstamped, no decree could have been passed thereon. The facts are that the arbitrator sent to

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each of the parties a copy of the award signed by him and a third copy also signed by him was sent to the court. The copy of the award which was sent to the Government would appear to have been insufficiently stamped. If that had been produced in court, it could have been validated on payment of the deficiency and penalty under Section 35 of the Indian Stamp Act, 1899. But the Government has failed to produce the same. The copy of the award which was sent to the respondents is said to have been seized by the police along with other papers and is not now available. When the third copy was received in court, the respondents paid the requisite stamp duty under Section 35 of the Stamp Act and had it validated. Now the contention of the appellant is that the instrument actually before the court is, what it purports to be, "a certified copy", and that under Section 35 of the Stamp Act there can be validation only of the original, when it is unstamped or insufficiently stamped, that the document in court which is a copy cannot be validated and "acted upon" and that in consequence no decree could be passed thereon. The law is no doubt well-settled that the copy of an instrument cannot be validated. That was held in *Rajah of Bobbili v. Inuganti China Sitaramasami Garu*¹ where it was observed:

"The provisions of this section (Section 35) which allow a document to be admitted in evidence on payment of penalty, have no application when the original document, which was unstamped or was insufficiently stamped, has not been produced; and, accordingly, secondary evidence of its contents cannot be given. To hold otherwise would be to add to the Act a provision which it does not contain. Payment of penalty will not render secondary evidence admissible, for under the stamp law penalty is leviable only on an unstamped or insufficiently stamped document actually produced in Court and that law does not provide for the levy of any penalty on lost documents."

Therefore the question is whether the award which was sent by the arbitrator to the court is the original instrument or a copy thereof. There cannot, in our opinion, be any doubt that it is the original and not a copy of the award. What the arbitrator did was to prepare the award in triplicate, sign all of them and send one each to the party and the third to the court. This would be an original instrument, and the words, "certified copy" appearing thereon are a mis-description and cannot have the effect of altering the true character of the instrument. There is no substance in this contention of the appellant either. In the result, the appeal fails and is dismissed with costs.

¹ 26 IA 262

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(1962) 2 SCR 880: AIR 1962 SC 113

Appeal by Special Leave from the Judgment and Order dated the 27-3-1957, of
the Patna High Court in Appeal from
Original Decree No. 359 of 1948.

BHIKRAJ JAIPURIA . . Appellant;

Versus

UNION OF INDIA . . Respondent.

Civil Appeal No. 86 of 1959, decided on 24th day of July, 1961.

Present :

THE HON'BLE JUSTICE J.L. KAPUR

THE HON'BLE JUSTICE K. SUBBA RAO

THE HON'BLE JUSTICE M. HIDAYATULLAH

THE HON'BLE JUSTICE J.C. SHAH

THE HON'BLE JUSTICE RAGHUBAR DAYAL

For the Appellant: A.V. Viswanatha Sastri, Senior Advocate (S.P. Varma, Advocate, with him)

For the Respondent: H.N. Sanyal, Addl. Solicitor-General of India (M/s R. Ganapathy Iyer and T.M. Sen, Advocates, with him)

The Judgment of the Court was delivered by

SHAH, J.— Bhikhraj Jaipuria — hereinafter called 'the appellant' — is the sole proprietor of a grocery business conducted in the name and style of "Rajaram Vijai Kumar" in the town of Arrah in the State of Bihar. In the months of July and August 1943, the Divisional Superintendent, East Indian Railway under three "purchase orders" agreed to buy and the appellant agreed to sell certain quantities of foodgrains for the employees of the East Indian Railway.

2. The following table sets out the purchase prices, the commodities, the dates of purchase orders, the quantities and the rates and the method of supply.

Purchase Order No.	Date of purchase orders	Kinds of commodity	Quantity of commodities	Rates
69	20-7-1943	Gram Ist quality	1000 maunds	@ Rs 15 per md (plus cost of new bags not exceeding Rs 75 per 100 bags) F.O.R. any E.I. Railway Station in Bihar.

76	24-7-1943	Rice Dhanki Medium quality	1000 mds	@ Rs 22-8-0 (plus cost of bags not exceeding Rs 75 per cent) per md F.O.R. any station on division.
Purchase Order No.	Date of purchase orders	Kinds of commodity	Quantity of commodities	Rates
		ii, wheat while as per sample.	5000 mds	@ Rs 20-8-0 per md with bags F.O.R. any station on E.I.R. on the Division.
106	24-8-1943	Rice medium quality	15000 mds	@ Rs 24 per md without bags F.O.R. E.I. Railway Station in Bihar.

3. Purchase Orders Nos. 69 and 76 were signed by S.C. Ribbins, Personal Assistant to the Divisional Superintendent and Purchase Order No. 106 was signed by the Divisional Superintendent. Under the purchase orders delivery of grains was to commence within seven days of acceptance and was to be completed within one month. The appellant delivered diverse quantities of foodgrains from time to time but was unable fully to perform the contracts within the period stipulated. Between 20-7-1943 and 24-8-1943, he supplied 3465 maunds of rice and between 1-9-1943 and 19-9-1943 he supplied 1152 maunds 35 seers of wheat. In exercise of the powers conferred by clause (b) of sub-rule (2) of Rule 81 of the Defence of India Rules, the Government of Bihar by Notification 12691-PC dated 16-9-1943, directed that commodities named in Column 1 of the schedule shall not, from and including 20-9-1943, and until further notice, be sold at any primary source of supply or by the proprietor, manager or employee of any mill in the Province of Bihar at prices exceeding those specified in the second column of the schedule. The controlled rate of rice (medium) was Rs 18 per standard maund, of wheat (red) Rs 17, of wheat (white) Rs 18 and of gram Rs 12-8.0. The Sub Divisional Magistrate, District Arrah issued on 21-9-1943 a price-list of controlled articles fixing the same prices as were fixed for wheat, rice and gram by the notification issued by the Government of Bihar. By clause (2) of the notification, a warning was issued that in the event of the dealers selling controlled articles at rates exceeding those fixed or with-holding stocks of such articles from sale, "they will be liable to prosecution under Rule 81(1) of the Defence of India Rules".

4. By a telegraphic communication dated 28-9-1943, the Divisional Superintendent informed the appellant that under the purchase orders, foodgrains tendered for delivery will not, unless despatched before 1-10-1943, be accepted, and barring a consignment of 637 maunds 20 seers accepted on 7-10-1943, the Railway Administration declined to accept delivery of foodgrains offered to be supplied by the appellant after 1-10-1943. The appellant served a notice upon the Divisional

Superintendent complaining of breach of contract and sold between February 18 and 23-2-1944 the balance of foodgrains under the purchase orders which were lying either at the various railway stations or in his own godowns. The appellant then called upon the Railway Administration to pay the difference between the price realised by sale and the contract price and failing to obtain satisfaction, commenced an action (Suit No. 359 of 1948-A) in the Court of the First Additional Subordinate Judge, Patna for a decree for Rs 2,89,995-15-3 against the Dominion of India. The appellant claimed Rs 2,32,665-12-0 being the difference between the contract price and the price realised, Rs 42,709-10-3 as interest and Rs 14,620-9-0 as freight, wharfage, cartage, price of packing material, labour charges and costs incurred in holding the sale. The appellant submitted that under the terms of the purchase orders, supply was to commence within seven days of the date of receipt of the orders and was to be completed within one month, but it was not intended that time should be of the essence of the contract, and in the alternative that the Railway Administration had waived the stipulation as to time in the performance of the contracts and therefore he was entitled, the Railway Administration having committed breach of the contracts, to recover as compensation the difference between the contract price and the price for which the grains were sold. The suit was resisted by the Dominion of India contending inter alia that the appellant had no cause of action for the claim in the suit, that the contracts between the appellant and the Divisional Superintendent, Dinapur were not valid and binding upon the Government of India and that the contracts were liable to be avoided by the Government, that time was of the essence of the contracts, that stipulations as to time were not waived, and that no breach of contract was committed by the East Indian Railway Administration and in any event, the appellant had not suffered any loss as a result of such breach. By the written statement, it was admitted that the East Indian Railway through the Divisional Superintendent Dinapur had by three orders set out in the plaint agreed to buy and the appellant had agreed to sell the commodities specified therein, but it was denied that the Divisional Superintendent had been "given complete authority to enter into contracts for the supply of foodgrains".

5. The trial court held that time was not of the essence of the contracts and even if it was, breach of the stipulation in that behalf was waived. It further held that the plea that the contracts were void because they were not in accordance with the provisions of Section 175(3) of the Government of India Act, 1935 could not be permitted to be urged, no such plea having been raised by the written statement. Holding that the Divisional Superintendent was authorised to enter into the contracts for purchase of foodgrains, and that he had committed breach of contract, the trial Judge awarded to the appellant Rs 1,29,460-7-0 with interest thereon at the rate of 6% per annum from 1-10-1943 to the date of the institution of the suit and further interest at 6% on judgment. Against that decree, an appeal was preferred by the Union of India to the High Court of Judicature at Patna and the appellant filed cross-objections to the decree appealed from. The High Court held that time was of the essence of the contracts, but the Railway Administration having accepted the goods tendered after the expiration of the period prescribed thereby, the stipulation as to time was waived. The High Court further held that by the notification under Rule 81 of the Defence of India Rules, performance of the contracts had not been rendered illegal but the Divisional Superintendent had no authority to enter into contracts to purchase foodgrains on behalf of the Railway Administration and that in any event, the contracts, not having been expressed to be made by the Governor-General and not having been executed on behalf of the Governor-General by an officer duly

appointed in that behalf and in manner prescribed, the contracts were unenforceable. The High Court also held that the appellant was not entitled to a decree for compensation because he had failed to prove the ruling market rate on the date of breach viz. 1-10-1943. The High Court also observed that the trial court erred in awarding interest prior to the date of the suit and in so holding, relied upon the judgment of the Privy Council in *Bengal Nagpur Railway Co., Ltd. v. Ruttanji Ramji*¹.

6. In this appeal by the appellant, two questions fall to be determined, (1) whether relying upon the purchase orders signed by the Divisional Superintendent which were not made and executed in the manner prescribed by Section 175(3) of the Government of India Act, 1935, the appellant could sue the Dominion of India for compensation for breach of contract, and (2) whether the appellant has proved the ruling market rate on 1-10-1943, for the commodities in question.

7. The finding that the Railway Administration had waived the stipulation as to the performance of the contracts within the time prescribed though time was under the agreement of the essence, is not challenged before us on behalf of the Union of India. If the finding as to waiver is correct, manifestly by his telegraphic intimation dated 28-9-1943, that the foodgrains not despatched before 1-10-1943, will not be accepted, the Divisional Superintendent committed a breach of the contract.

8. "Section 175(3) of the Government of India Act as in force at the material time provided:

"Subject to the provisions of this Act, with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise."

9. The Federal Railway Authority had not come into being in the year 1943: it was in fact never set up. The contracts for the supply of foodgrains were undoubtedly made in the exercise of executive authority of the Federation. The contracts had therefore under Section 175(3)(a) to be expressed to be made by the Governor-General (b) to be executed on behalf of the Governor-General, and (c) to be executed by officers duly appointed in that behalf and in such manner as the Governor-General may direct or authorise. But no formal contracts were executed for the supply of foodgrains by the appellant: he had merely offered to supply foodgrains by letters addressed to the Divisional Superintendent and that officer had by what are called "purchase orders" accepted those offers. These purchase orders were not expressed to be made in the name of the Governor-General and were not executed on behalf of the Governor-General. The purchase orders were signed by the Divisional Superintendent either in his own hand or in the hand of his Personal Assistant. In the first instance, it has to be considered whether the Divisional Superintendent had authority to contract on behalf of the Railway Administration for buying foodgrains required by the Railway Administration. By Ex. M-2 which was in operation at the material time, all instruments relating to purchase or hire, supply and conveyance of materials, stores, machinery, plant, telephone lines and connections, coal, etc., could be executed amongst others by the Divisional Superintendent; but contracts relating to purchase of foodgrains are not covered by that authority. Under Item 34

which is the residuary item, all deeds and instruments relating to railway matters other than those specified in Items 1 to 33 may be executed by the Secretary of the Railway Board. It is common ground that there is no other item which specifically authorises the making and execution of contracts relating to purchase of foodgrains; deeds and instruments relating to purchase of foodgrains therefore fall within Item 34. The Secretary to the Railway Board had not executed these purchase orders: but the trial court held that the Divisional Superintendent was authorised to enter into contracts with the appellant for the supply of foodgrains. In so holding, the trial Judge relied upon the evidence of Ribbins, Grain Supply Officer and Personal Assistant to the Divisional Superintendent, Dinapur. The High Court disagreed with that view. The High Court observed that the authority of the officer acting on behalf of the Governor-General "must be deduced from the express words of the Governor-General himself expressed by rules framed or by notification issued, under Section 175(3). No notification has been produced in this case showing that the Divisional Superintendent had been authorised by the Governor-General to execute such contracts on his behalf, nor has any rule been produced which conferred authority upon the Divisional Superintendent to make such contracts".

After referring to para 10 of the notification, Ex. M-2 Items 1 to 34, the High Court observed:

"Therefore this notification rather shows that the Divisional Superintendent had no authority to execute the contracts for the purchase of foodgrains."

10. In our view, the High Court was in error in holding that the authority under Section 175(3) of the Government of India Act, 1935, to execute the contract could only be granted by the Governor-General by rules expressly promulgated in that behalf or by formal notifications. This court has recently held that special authority may validly be given in respect of a particular contract or contracts by the Governor to an officer other than the officer notified under the rules made under Section 175 (3). In *State of Bihar v. Karam Chand Thapar and Brothers Ltd.*² Venkatarama Aiyar, J. speaking for the Court observed:

"It was further argued for the appellant that there being a Government notification of a formal character, we should not travel outside it and find authority in a person who is not authorised thereunder. But Section 175(3) does not prescribe any particular mode in which authority must be conferred. Normally, no doubt, such conferment will be by notification in the Official Gazette, but there is nothing in the section itself to preclude authorisation being conferred ad hoc on any person, and when that is established, the requirements of the section must be held to be satisfied."

11. In that case, an agreement to refer to arbitration on behalf of the Government of Bihar was executed by the Executive Engineer whereas by the notification issued by the Government of Bihar under Section 175(3) all instruments in that behalf had to be executed by the Secretary or the Joint Secretary to the Government. This court on a consideration of the correspondence produced in the case agreed with the High Court that the Executive Engineer had been specially authorised by the Governor acting through his Secretary to execute the agreement for reference to arbitration. Section 175(3) in terms does not provide that the direction or authority given by the Governor-General or the Governor to a person to execute contracts shall be given only by rules or by notifications, and the High Court was in our judgment in error in

assuming that such authority can be given only by rules expressly framed or by formal notifications issued in that behalf.

12. In para 5 of the plaint, the appellant pleaded:

"That for the purposes and under the authority conferred as noted in the para 3 above in July and August 1943, the said East Indian Railway through its then Divisional Superintendent, Dinapore, by three diverse orders agreed to buy and the plaintiff agreed to sell the following commodities @ the rates mentioned against them."

13. By para 3 of the written statement, the Dominion of India accepted the allegations made in para 5 of the plaint. It is true that by para 1, the authority of the Divisional Superintendent to enter into contract with trading firms dealing in foodgrains for the supply of foodgrains was denied and it was further denied that the Divisional Superintendent "was invested with complete authority to enter into contracts for the purchase of food supplies and to do all that was necessary in that connection". There was some inconsistency between the averments made in paragraphs 1 and 3 of the written statement, but there is no dispute that the purchase orders were issued by the Divisional Superintendent for and on behalf of the East Indian Railway Administration. Pursuant to these purchase orders, a large quantity of foodgrains was tendered by the appellants: these were accepted by the Railway Administration and payments were made to the appellant for the grains supplied. Employees of the Railway Administration wrote letters to the appellant calling upon him to intimate the names of the railway stations where grains will be delivered and about the date when the supply will commence. They fixed programmes for inspection of the goods, kept wagons ready for accepting delivery, held meetings on diverse occasions for settling programmes for the supply of grains, rejected grains which were not according to the contract, entered into correspondence with the appellant about the return of empty bags, accepted bills and railway receipts and made payments, returned certain bills in respect of the grains tendered beyond the period of contract and did diverse other acts in respect of the goods which could only be consistent with the contracts having been made with the authority of the Railway Administration granted to the Divisional Superintendent. There is also the evidence of Ribbins which clearly supports the view that the agreements to purchase foodgrains by the Divisional Superintendent were part of a scheme devised by the Railway Administration at the time of the serious famine in 1943 in Bengal. In cross-examination, Ribbins stated:

"When the Bengal famine arose in April-May 1943, the (necessity for a scheme of) arrangement of supplying foodgrains to East Indian Railway employees arose.... A scheme was drawn up for carrying out this work in writing. In other words orders were received from Head Office Calcutta about it. The Deputy General Manager, Grains, Calcutta issued the necessary orders.... The agent or General Manager as he is called appropriated the above functionary. He must have do so presumably under orders.... The entire scheme did subsequently get the assent of the Railway Board.... From time to time order came with instruction from Head Office. All such directions should be in the office of Dy. Supdt., Dinapore. Some posts had to be created for carrying out this scheme. Originally one post of Asstt. Grain Supply Officer was created. Subsequently, two posts were created, one on a senior scale and the other as Asst. in Dinapore Dy. Staff had to be appointed to be in charge of the grain shops. They were exclusively appointed to work the grain shop organisation. The Railway made some arrangement in some places for accommodation and additional

storage.... Grain shops were located at these places when accommodation was made for additional storage."

14. Ribbins was for some time a Grain Supply Officer under the East Indian Railway and he admitted that orders similar to the purchase orders in question in this litigation were drawn up in cyclostyled forms "as per orders from the Head Office". The witness stated that the instructions of the Head Office were "in the office file". None of these documents were however produced or tendered in evidence by the Railway Administration.

15. The evidence on the whole establishes that with a view to effectuate the scheme devised by the Railway Board for distributing foodgrains to their employees at concessional rates, arrangements were made for procuring foodgrains. This scheme received the approval of the Railway Board and Railway Officers were authorised to purchase, transport and distribute foodgrains. If, in the implementation of the scheme, the foodgrains were received by the Railway Administration, special wagons were provided and goods were carried to different places and distributed and payments were made for the foodgrains received by the Railway Administration after testing the supplies, the inference is inevitable that the Divisional Superintendent who issued the purchase orders acted with authority specially granted to him. The evidence of Ribbins supported by abundant documentary evidence establishes beyond doubt that the Divisional Superintendent though not expressly authorised by the notification Ex. M-2 to contract for the purchase of foodgrains, was specially authorised to enter into these contracts for the purchase of foodgrains.

16. The question still remains whether the purchase orders executed by the Divisional Superintendent but which were not expressed to be made by the Governor-General and were not executed on behalf of the Governor-General, were binding on the Government of India. Section 175(3) plainly requires that contracts on behalf of the Government of India shall be executed in the form prescribed thereby; the section however does not set out the consequences of non-compliance. Where a statute requires that a thing shall be done in the prescribed manner or form but does not set out the consequences of non-compliance, the question whether the provision was mandatory or directory has to be adjudged in the light of the intention of the legislature as disclosed by the object, purpose and scope of the statute. If the statute is mandatory, the thing done not in the manner or form prescribed can have no effect or validity: if it is directory, penalty may be incurred for non-compliance, but the act or thing done is regarded as good. As observed in *Maxwell on Interpretation of Statutes*, 10th Edn., p. 376:

"It has been said that no rule can be laid down for determining whether the command is to be considered as a mere direction or instruction involving no invalidating consequence in its disregard, or as imperative, with an implied nullification for disobedience, beyond the fundamental one that it depends on the scope and object of the enactment. It may perhaps be found generally correct to say that nullification is the natural and usual consequence of disobedience, but the question is in the main governed by considerations of convenience and justice, and when that result would involve general inconvenience or injustice to innocent persons, or advantage to those guilty of the neglect, without promoting the real aim and object of the enactment, such an intention is not to be attributed to the legislature. The whole scope and purpose of the statute under consideration must be regarded."

Lord Campbell in *Liverpool Borough Bank v. Turner*² observed:

"No universal rule can be laid down as to whether mandatory enactments shall be considered directory only or obligatory with an implied nullification for disobedience. It is the duty of courts of justice to try to get at the real intention of the legislature by carefully attending to the whole scope of the statute to be construed."

17. It is clear that the Parliament intended in enacting the provision contained in Section 175(3) that the State should not be saddled with liability for unauthorised contracts and with that object provided that the contracts must show on their face that they are made on behalf of the State, i.e., by the Head of the State and executed on his behalf and in the manner prescribed by the person authorised. The provision, it appears, is enacted in the public interest, and invests public servants with authority to bind the State by contractual obligations incurred for the purposes of the State.

18. It is in the interest of the public that the question whether a binding contract has been made between the State and a private individual should not be left open to dispute and litigation; and that is why the legislature appears to have made a provision that the contract must be in writing and must on its face show that it is executed for and on behalf of the head of the State and in the manner prescribed. The whole aim and object of the legislature in conferring powers upon the head of the State would be defeated if in the case of a contract which is in form ambiguous, disputes are permitted to be raised whether the contract was intended to be made for and on behalf of the State or on behalf of the person making the contract. This consideration by itself would be sufficient to imply a prohibition against a contract being effectively made otherwise than in the manner prescribed. It is true that in some cases, hardship may result to a person not conversant with the law who enters into a contract in a form other than the one prescribed by law. It also happens that the Government contracts are sometimes made in disregard of the forms prescribed; but that would not in our judgment be a ground for holding that departure from a provision which is mandatory and at the same time salutary may be permitted.

19. There is a large body of judicial opinion in the High Courts in India on the question whether contracts not in form prescribed by the Constitution Acts are binding upon the State. The view has been consistently expressed that the provisions under the successive Constitution Acts relating to the form of contract between the Government and the private individual are mandatory and not merely directory.

20. In *Municipal Corporation of Bombay v. Secretary of State*⁴ the true effect of Section 1 of St. 22 and 23 Vic. Order 41 fell to be determined. The Governor-General-of-India-in-Council and the Governors-in-Council and officers for the time being entrusted with the Government were, subject to restrictions prescribed by the Secretary of State-in-Council, empowered to sell and dispose of real and personal estate vested in Her Majesty and to raise money on such estate and also to enter into contracts within the respective limits for the purposes of the Act. It was provided that the Secretary of State-in-Council may be named as a party to such deed, contract, or instrument and the same must be expressed to be made on behalf of the Secretary of State-in-Council by or by the order of the Governor-General-in-Council or Governor-in-Council, but may be executed in other respects in like manner as other instruments executed by or on behalf of him or them respectively in

his or their official capacity, and may be enforced by or against the Secretary of State in Council for the time being. In a suit between the Government of Bombay and the Municipal Corporation of Bombay, the latter claimed that it was entitled to remain in occupation, on payment of a nominal rent, of an extensive piece of land because of a resolution passed by the Government of Bombay sanctioning such user. Jenkins, C.J. in delivering the judgment of the court observed:

"I think that a disposition in 1865 of Crown lands by the Governor-in-Council was dependent for its validity on an adherence to the forms prescribed, and that therefore the Resolution was not a valid disposition of the property for the interest claimed."

21. In *Kessoram Poddar and Co. v. Secretary of State for India*⁵ it was held that in order that a contract may be binding on the Secretary of State-in-Council, it must be made in strict conformity with the provisions laid down in the statute governing the matter and if it is not so made, it is not valid as against him.

22. The same view was expressed in *S.C. Mitra and Co. v. Governor-General of India -in-Council*⁶ *Secretary of State v. Yadavgir Dharamgir*⁷, *Secretary of State v. G.T. Sarin and Company*⁸, *U.P. Government v. Lala Nanhoo Mal Gupta*⁹, *Devi Prasad Sri Krishna Prasad Ltd. v. Secretary of State*¹⁰ and in *S.K. Sen v. Provincial PWD, State of Bihar*¹¹.

23. But Mr Viswanatha Sastri on behalf of the appellant contended that the court in *Chatturbhuj Vithaldas Jasani v. Moreshwar Parashram*¹² has held that a contract for the supply of goods to the Government which is not in the form prescribed by Article 299(1) of the Constitution (which is in substantially the same form as Section 175 (3) of the Government of India Act, 1935) is not void and unenforceable. In that case, the election of Chatturbhuj Jasani to the Parliament was challenged on the ground that he had a share or interest in a contract for the supply of goods to the Union Government. It was found that Jasani was a partner of a firm which had entered into contracts with the Union Government for the supply of goods and these contracts subsisted on 15-11-1951 and 14-2-1952, respectively the last date for filing nominations and the date of declaration of the results of the election. This court held that Jasani was disqualified from being elected by virtue of the disqualification set out in Section 7(d) of the Representation of the People Act 43 of 1951. The contracts in that case were admittedly not in the form prescribed by Article 299(1) of the Constitution, and relying upon that circumstance, it was urged that the contracts were void and had in law no existence. In dealing with this plea, Bose, J., speaking for the court observed:

"We feel that some reasonable meaning must be attached to Article 299(1). We do not think the provisions were inserted for the sake of mere form. We feel they are there to safeguard Government against unauthorised contracts. If in fact a contract is unauthorised or in excess of authority it is right that Government should be safeguarded. On the other hand, an officer entering into a contract on behalf of the Government can always safeguard himself by having recourse to the proper form. In between is a large class of contracts, probably by far the greatest in numbers, which though authorised, are for one reason or other not in proper form. It is only right that an innocent contracting party should not suffer because of this and if there is no other defect or objection we have no doubt Government will always accept the responsibility. If not, its interests are safeguarded as we think the Constitution

intended that they should be."

24. The learned Judge also observed:

"It would, in our opinion, be disastrous to hold that the hundreds of Government officers who have daily to enter into a variety of contracts, often of a petty nature, and sometimes in an emergency, cannot contract orally or through correspondence and that every petty contract must be effected by a ponderous legal document couched in a particular form."

25. The rationale of the case in our judgment does not support the contention that a contract on behalf of a State not in the form prescribed is enforceable against the State. Bose, J. expressly stated that the "Government may not be bound by the contract, but that is a very different thing from saying that the contract was void and of no effect, and that it only meant that the principal (Government) could not be sued; but there will be nothing to prevent ratification if it was for the benefit of the Government."

26. The facts proved in that case clearly establish that even though the contract was not in the form prescribed, the Government had accepted performance of the contract by the firm of which Jasani was a partner, and that in fact there subsisted a relation between the Government and the firm under which the goods were being supplied and accepted by the Government. The agreement between the parties could not in the case of dispute have been enforced at law, but it was still being carried out according to its terms: and the court held that for the purpose of the Representation of the People Act, the existence of such an agreement which was being carried out in which Jasani was interested disqualified him. It was clearly so stated when Bose, J. observed:

"Now Section 7(d) of the Representation of the People Act does not require that the contracts at which it strikes should be enforceable against the Government; all it requires is that the contracts should be for the supply of goods to the Government. The contracts in question are just that and so are hit by the section."

27. Reliance was also placed by counsel for the appellant upon cases decided under Section 40 of the Government of India Act, 1915 which was continued in operation even after the repeal of the Act of 1915 by the Ninth Schedule to the Government of India Act, 1935. Section 40 prescribed the manner in which the business of the Governor-General-in-Council was to be conducted. It provided that all orders and other proceedings of the Governor-General-in-Council shall be expressed to be made by the Governor-General-in-Council and shall be signed by a Secretary to the Government of India or otherwise as the Governor-General-in-Council may direct and shall not be called in question in any legal proceeding on the ground that they were not duly made by the Governor-General-in-Council.

28. In *J.K. Gas Plant Manufacturing Co. (Rampur) Ltd. v. King-Emperor*¹³ certain persons were accused of offences committed by them in contravention of clauses (5) and (8) of the Iron and Steel (Control of Distribution) Order, 1941, which order was not expressed to be made by the Governor-General-in-Council as required by Section 40(1) of the 9th Schedule to the Constitution Act. The Federal Court held that the scope and purpose of the Act did not demand a construction giving a mandatory rather than a directory effect to the words in Section 40: for, in the first instance, the provision that all orders of the Governor-General-in-Council shall be

expressed to be made by the Governor-General-in-Council did not define how orders were to be made but only how they are to be expressed; it implied that the process of making an order preceded and was something different from the expression of it. Secondly, it was observed, the provision was not confined to orders only and included proceedings and in the case of proceedings, it was still clearly a method of recording proceedings which had already taken place in the manner prescribed rather than any form in which the proceedings must take place if they are valid. Thirdly, it was observed, that the provision relating to the signature by a Secretary to the Government of India or other person indicated that it was a provision as to the manner in which a previously made order should be embodied in publishable form, and it indicated that if the previous directions as to the expression of the order and proceedings and as to the signature were complied with, the order and proceedings shall not be called in question in a court of law on one ground only.

29. The rule contained in Section 40(1) was in the view of the court one of evidence which dispensed with proof of the authority granted by the Governor-General in respect of orders or proceedings which complied with the requirements prescribed: the making of the order or the proceedings was independent of the form of the order or proceedings expressing it. But it cannot be said that the making of the contract is independent of the form in which it is executed. The document evidencing the contract is the sole repository of its terms and it is by the execution of the contract that the liability *ex contractu* of either party arises.

30. The principle of *J.K. Gas Plant Manufacturing Co. case*¹³ has therefore no application in the interpretation of Section 175(3) of the Government of India Act, 1935.

31. Reliance was also placed upon *Dattatreya Moreshwar Pangarkar v. State of Bombay*¹⁴ and *State of Bombay v. Purushottam Jog Naik*¹⁵. In both these cases, orders made by the Government of Bombay under the Preventive Detention Act were challenged on the ground that the orders did not comply with the requirements of Article 166 of the Constitution. Article 166 substantially prescribes the same rules for authentication of the orders of the Governor of a State as Section 40 to the Ninth Schedule of the Government of India Act, 1935 prescribed for the authentication of the orders of the Governor-General and the Governors. In the former case, this court observed that the Preventive Detention Act contemplates and requires the taking of an executive decision for confirming a detention order under Section 11(1) and omission to make and authenticate that decision in the form set out in Article 166 will not make the decision itself illegal, for the provisions in that article are merely directory and not mandatory. In the latter case, an order which purported to have been made in the name of the Government of Bombay instead of the Governor of Bombay as required by Article 166 was not regarded as defective and it was observed that in any event, it was open to the State Government to prove that such an order was validly made. The court in those cases therefore held that the provisions of Article 166 are directory and not mandatory.

32. These cases proceed on substantially the same grounds on which the decision in *J.K. Gas Plant and Manufacturing Co. case*¹³ proceeded, and have no bearing on the interpretation of Section 175(3) of the Government of India Act, 1935.

Reliance was also placed upon the *State of U.P. v. Manbodhan Lal Srivastava*¹⁶ in which case this Court held that the provisions of Article 320 clause (3)(c) of the

Constitution relating to the consultation with the Public Service Commission before discharging a public servant are merely directory.

33. The fact that certain other provisions in the Constitution are regarded as merely directory and not mandatory, is no ground for holding that the provisions relating to the form of contracts are not mandatory. It may be said that the view that the provisions in the Constitution relating to the form of contracts on behalf of the Government are mandatory may involve hardship to the unwary. But a person who seeks to contract with the Government must be deemed to be fully aware of statutory requirements as to the form in which the contract is to be made. In any event, inadvertence of an officer of the State executing a contract in manner violative of the express statutory provision, the other contracting party acquiescing in such violation out of ignorance or negligence will not justify the court in not giving effect to the intention of the legislature, the provision having been made in the interest of the public. It must therefore be held that as the contract was not in the form required by the Government of India Act, 1935, it could not be enforced at the instance of the appellant and therefore the Dominion of India could not be sued by the appellant for compensation for breach of contracts.

34. We are also of the view that the High Court was right in holding that the appellant failed to prove that he was entitled to compensation assuming that there was a valid and enforceable contract. The appellant claimed that he was entitled to the difference between the contract price and the price realised by sale of the foodgrains offered after 1-10-1943, but not accepted by the Railway Administration. The High Court rightly pointed out that the appellant was, if at all, entitled only to compensation for loss suffered by him by reason of the wrongful breach of contract committed by the State, such compensation being the difference between the contract price and the ruling market rate on 1-10-1943, and that the appellant had failed to lead evidence about the ruling market rate on 1-10-1943. The trial Judge held that the "control price-list ... was reliable for ascertaining the measure of damages in the case". This document was a notification relating to the controlled rates in operation in the district of Arrah, by which the sale of foodgrains at prices exceeding the rates prescribed was made an offence. The appellant had obviously the option of delivering foodgrains at any railway station F.O.R. in the Province of Bihar, and there is no evidence on the record whether orders similar to Ex. M-2 were issued by the authorities in other districts of the Bihar State. But if the grains were supplied in the district of Arrah, the appellant could evidently not seek to recover price for the goods supplied and accepted on and after 1-10-1943, at rates exceeding those fixed by the notification; for, by the issue of the control orders, on the contracts must be deemed to be super-imposed the condition that foodgrains shall be sold only at rates specified therein. If the grains were to be supplied outside the district of Arrah, the case of the appellant suffers from complete lack of evidence as to the ruling rates of the foodgrains in dispute on 1-10-1943. The High Court was therefore right in declining to award damages.

35. On the view taken by us, this appeal must stand dismissed with costs.

¹ L.R. (1938) 65 I.A. 66

² Civil Appeal No. 209 of 1959 decided on April 7, 1961

³ (1861) 30 U Ch 379

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⁴ ILR (1905) 29 Bom 580

⁵ ILR (1927) 54 Cal 969

⁶ ILR. 1950 2 Cal 431

⁷ ILR (1936) 60 Bom 42

⁸ ILR (1930) 11 Lah 375

⁹ AIR (1960) All 420

¹⁰ ILR (1941) All 741

¹¹ AIR (1960) Pat 159

¹² (1954) SCR 817

¹³ (1947) FCR 141

¹⁴ (1952) SCR 612

¹⁵ (1952) SCR 674

¹⁶ (1958) SCR 533

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1963 Supp (1) SCR 539: AIR 1963 SC 1503

(Under the Article 32 of the Constitution of India, for the enforcement of
Fundamental Rights)

ROOP CHAND . . Petitioner;

Versus

STATE OF PUNJAB AND ANOTHER . . Respondent.

Writ Petition No. 77 of 1957, decided on 10th day of October, 1962

Present:

THE HON'BLE JUSTICE S.K. DAS

THE HON'BLE JUSTICE J.L. KAPUR

THE HON'BLE JUSTICE A.K. SARKAR

THE HON'BLE JUSTICE M. HIDAYATULLAH

THE HON'BLE JUSTICE RAGHUBAR DAYAL

For the Petitioner: Pritam Singh Safeer, Advocate

For Respondent 1: S.M. Sikri, Advocate-General for the State of Punjab and N.S. Bindra, Senior Advocate (P.D. Menon, Advocate, with them)

For Respondent 2: N.S. Bindra, Senior Advocate (Govind Saran Singh, Advocate, with him)

The Judgments of the Court were delivered by

SARKAR, J.— This petition under Article 32 of the Constitution asks for a writ quashing an order purported to have been made under Section 42 of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948. It is said that the order was entirely without jurisdiction and if allowed to stand, it would deprive the petitioner of certain lands and so wrongfully affect his fundamental rights under Part III of the Constitution.

2. The question raised by this petition depends on a construction of certain provisions of the Act which we shall later quote. A general idea of some of the purposes and provisions of the Act will however be useful for deciding that question and may be given now.

3. Shortly put, one of the objects of the Act appears to be to pool together the entire lands held by different persons in a village and redistribute the same among them on a more utilitarian basis in accordance with a scheme framed for the purpose. The final result that the Act achieves is that instead of his original holding a person is given some other holding. Section 14 gives the State Government the power to declare by notification its intention to frame a scheme for the consolidation of holdings in any area, and thereupon to appoint a Consolidation Officer who is to prepare the scheme. Section 19 provides for publication of the draft scheme prepared by the Consolidation Officer and for objections thereto being made by persons likely to be affected. It also provides that the Consolidation Officer will submit the scheme with the objections and his suggestions with regard to them to

the Settlement Officer and for republication of the scheme with such amendments as may have been made. Section 20 empowers the State Government to appoint Settlement Officers (Consolidation), in this judgment referred to as Settlement Officers. It further provides that if no objections are received to the draft scheme when first published or to the amended scheme when republished, the Settlement Officer shall confirm the scheme and if any objections are received, he may after considering the objections, confirm the scheme with or without modification. It lastly provides that upon confirmation the scheme shall be published again. Sub-section (1) of Section 21 provides that the Consolidation Officer shall carry out a re-partition in accordance with the scheme as confirmed under Section 20. Sub-section (2) provides that any person aggrieved by the repartition may file an objection before the Consolidation Officer. Sub-section (3) gives to the person aggrieved by the order of Consolidation Officer made under sub-section (2), a right to file an appeal before the Settlement Officer. Sub-section (4) provides that "any person aggrieved by the order of the Settlement Officer (Consolidation) under sub-section (2) may within sixty days of that order appeal to the State Government". Section 22 requires the Consolidation Officer to prepare a new record of rights giving effect to the repartition as finally sanctioned under Section 21.

4. A scheme under the Act had been framed for Village Palrikalan where the petitioner held some lands. The petitioner had no objection to the scheme as such but he had taken objection to the repartition made under it by the Consolidation Officer on the ground that the repartition was not in accordance with the scheme. The petitioner contended that under the scheme he was entitled to retain Plots Nos. 635 and 636 which originally belonged to him and to get some more land adjacent to them in exchange for other lands held by him in the village while under the repartition made by the Consolidation Officer he was being deprived of those plots and was being given lands elsewhere. With the merits of this and the rival contention we are not concerned in this petition. The petitioner's contention was rejected by the Consolidation Officer and he filed an appeal under Section 21(3) before the Settlement Officer but that appeal also failed. The petitioner thereafter went up in appeal under Section 21(4) against the order of the Settlement Officer.

5. Now, Section 21(4) provided for an appeal to the State Government but the petitioner's appeal was heard by Shri Brar, Assistant Director, Consolidation of Holdings, Ambala to whom the Government's powers and functions concerning the appeal had been delegated under Section 41(1) which is in these terms:

"41. 1 The State Government may for the administration of this Act, appoint such persons as it thinks fit, and may by notification delegate any of its powers or functions under this Act to any of its officers either by name or designation."

6. Shri Brar allowed the petitioner's appeal. As a result of his decision the petitioner became entitled to retain Plots Nos. 635 and 636 which he originally owned and Hari Singh, Respondent 2, to this petition who had on the repartition been given by the Consolidation Officer those plots along with some more adjacent lands, was to be deprived of them. Hari Singh being dissatisfied with the order of Shri Brar moved the Government under Section 42 of the Act and the impugned order was thereupon made. That order set aside the order of Mr Brar and restored that of the Consolidation Officer. As a result of this order, therefore, the petitioner was to be deprived of Plots Nos. 635 and 636.

7. It is now necessary to set out Section 42 on the interpretation of which this

petition depends. That section was amended by Act 27 of 1960 with retrospective effect and it is the amended section that has to be considered by us. The amended section is in these terms:

"42. The State Government may at any time for the purpose of satisfying itself as to the legality or propriety of any order passed, scheme prepared or confirmed or reparation made by any officer under this Act call for and examine the records of any case pending before or disposed of by such officer and may pass such order in reference thereto as it thinks fit."

8. The petitioner's contention is that an order which can be interfered with under Section 42 is an order passed under the Act by any officer in his own right and not on order made by the Government itself or by any officer exercising powers of the Government upon delegation under Section 41(1).

9. The question really is as to the meaning of the words "any order passed ... by any officer under this Act" in Section 42. Do these words include an order passed by an officer in exercise of powers delegated to him by the Government under Section 41(1)? We do not think, they do.

10. Now, there cannot be much doubt that Section 42 makes a distinction between the Government and an officer, because under it the Government is given power to interfere with an order passed by an officer and, therefore, it does not authorize the Government to interfere with an order made by itself. As we understood the learned Advocate-General of Punjab, who appeared for the respondent State of Punjab, he conceded that position. He said that the Government could no doubt have itself heard an appeal preferred under Section 21(4) instead of getting it heard by an officer to whom it delegated its power, and if it did so, then it could not under Section 42 interfere with the order which it itself passed in the appeal. We think that this is the correct position, and we wish to make it clear that we are not basing ourselves on the concession made by the learned Advocate-General. We feel no doubt that an order passed by an officer of the Government cannot be an order passed by the Government itself.

11. The question then arises, when the Government delegates its power, for example, to entertain and decide an appeal under Section 21(4), to an officer and the officer pursuant to such delegation hears the appeal and makes an order, is the order an order of the officer or of the Government? We think it must be the order of the Government. The order is made under a statutory power. It is the statute which creates that power. The power can, therefore, be exercised only in terms of the statute and not otherwise. In this case the power is created by Section 21(4). That section gives a power to the Government. It would follow that an order made in exercise of that power will be the order of the Government for no one else has the right under the statute to exercise the power. No doubt the Act enables the Government to delegate its power but such a power when delegated remains the power of the Government, for the Government can only delegate the power given to it by the statute and cannot create an independent power in the officer. When the delegate exercises the power, he does so for the Government. It is of interest to observe here that Wills, J. said in *Huth v. Clarke*¹ that "the word delegate means little more than an agent". An agent of course exercises no powers of his own but only the powers of his principal. Therefore, an order passed by an officer on delegation to him under Section 41(1) of the power of the Government under Section 21(4), is for the purposes of the Act, an order of the Government. If it were

not so and it were to be held that the order had been made by the officer himself and was not an order of the Government — and of course it had to be one or the other — then we would have an order made by a person on whom the Act did not confer any power to make it. That would be an impossible situation. There can be no order except as authorized by the Act. What is true of Section 21(4) would be true of all other provisions in the Act conferring powers on the Government which can be delegated to an officer under Section 41(1). If we are wrong in the view that we have taken, then in the case of an order made by an officer as delegate of the Government's power under Section 21(4) we would have an appeal entertained and decided by one who had no power himself under the Act to do either. Plainly, none of these things could be done.

12. Again, if an order passed by an officer to whom a power had been delegated by the Government under Section 41(1) was an order passed by the officer, then an order made by an officer to whom power under Section 42 had been delegated would also be an order by an officer within the meaning of Section 42. That order would then be liable to be interfered with by the Government under Section 42 and if such interference is again not by the Government itself but by another officer as its delegate, then in that way the process of interference might be repeated for ever. Obviously an interpretation leading to such a result cannot be correct. It is of some interest to point out here that in the present case the order under Section 42, that is, the impugned order, had not been made by the Government itself but by the Director, Consolidation of Holdings, to whom the Government's power under that section had been delegated.

13. It was however said by the learned Advocate-General that this absurd result would not follow because power under Section 42 can be exercised only once in respect of the same order. We will assume that power can be exercised in respect of the same order only once. But even so it seems to us that if the order by a delegate officer is an order within Section 42, then the power under that section can be exercised repeatedly. This will appear clearly if we take an illustration. Suppose delegate officer A makes an order under Section 21(4). This order can be interfered with by the Government under Section 42. Now suppose the Government delegates its power under Section 42 to officer B and officer B then makes an order under Section 42 as delegate of Government. That would be an order made by a delegate officer and capable of being interfered with under Section 42. This exercise of power would be in respect of an order of officer B and therefore not in respect of the same order in respect of which power under Section 42 had been once exercised, namely, the order by officer A. Now assume this time delegate officer C exercises Government's power under Section 42. Again the order made by him would be interfered with under Section 42. Repeated exercise of power would be in respect of successive orders and never in respect of the same order. In this way finality in the matter can never be reached. We must reject an interpretation which prevents finality being reached. On the interpretation that we have suggested the matter would be finally decided; the power under Section 42 cannot be exercised more than once in respect of the same matter.

14. We think there are other reasons leading to the view that the order contemplated by Section 42 is an order made by an officer in his own right. The words "The State Government may ... call for and examine the record of any case pending before or disposed of by such officer" in the section clearly indicate that the records are not in the possession of the Government but are in the possession of

somebody else in his own right and, therefore, it is that the Government is given power to "call for" those records. It would not be necessary to give the Government expressly the power to call for records if the records were with the Government's delegate, for such delegate would be even without such express power, within the control of the Government. The records with the delegate would really be records in the possession of the Government. Furthermore, the expression "call for" the records is one familiar to courts of law. It occurs in Section 115 of the Code of Civil Procedure where a superior court which, therefore, is a different court, is given the power to call for the records of a subordinate court. It may reasonably be presumed that by using the familiar words "call for" the records, the legislature indicated that the officer whose order was to be interfered with under Section 42 was an officer exercising independent powers and therefore a subordinate officer and not an officer exercising powers delegated by the Government.

15. We do not think that *Lakha Singh Toba Singh v. Director, Consolidation of Holdings, Punjab*² to which we were referred was correctly decided. There Falshaw, J. with whom Dua, J. agreed, approved of an earlier decision by Bishan Narain, J. where the latter said that "under Section 40(1) the Government can delegate its powers or function only to one of its officers. It, therefore, follows that the Government's delegate under Section 20(4) is an officer and as he is appointed under this Act and has to perform duties relating to administration of this Act, he must be held to be an officer under this Act". Falshaw, J. as also Bishan Narain, J. were dealing with the Pepsu Holdings (Consolidation and Prevention of Fragmentation) Act. This Act however contained the same provisions as the Act now before us though the sections were numbered differently. Apparently, the learned Judges were of the view that the words "under this Act" in Section 41 of the Act before them which corresponds to Section 42 of our Act, referred to the word "officer" and not to the word "order". But we do not think that that view solves the problem. The question is not whether the officer is one under the Act, which perhaps means mentioned in or appointed under the Act, but whether the order is by him in his own right as such officer? We may point out that the Act does not expressly say that an officer to whom Government may delegate its power under Section 40(1) has to be an officer "under the Act". Falshaw, J. thought that the words "any order passed by any officer under this Act" in Section 41 of the Act before him should be read as "any order passed under any provision of the Act by any officer having power to pass any order under the Act". If they are so read, we think they would mean that the officer had power under the Act to pass the order in his own right and not as delegate of the Government.

16. The learned Advocate-General said that when power is delegated to an officer under Section 40(1), he does not cease to be an officer and therefore an order passed by him is an order passed by an officer within Section 42. It seems to us that this is not at all determinative. If the officer does not cease to be an officer because Government had delegated power to him, neither does he cease to be a delegate of the Government because he is an officer. The real question is different. It is whether the order made by the officer was made as a delegate of the Government or in his own right.

17. Then it was pointed out that the order in this case was the order of an officer and not of the Government at all, for if it had been the order of the Government it would have been made in the name of the Governor as required by the rules of executive business framed under Article 166 of the Constitution. But it seems to us

that the form in which the order was made is immaterial. The order was not in fact made by the Government but by somebody else in exercise of the power which lay vested in the Government alone. We are not aware that such an order has to be in the name of the Governor. The question is, in whose right has an order to be made so that it may be interfered with under Section 42? It is of no help in answering that question to consider the form in which the order was made.

18. The learned Advocate-General then said that the words "under the Act" in the section referred to the word "order" only and not to the word "officer" and therefore the order contemplated by it may be one made by an officer to whom power was delegated by the Government for that would be an order contemplated by the Act and therefore an order "under the Act". We think that this is a pointless contention. When the Act permits an order to be made, it must at the same time indicate, as the present Act does, who is to make the order. Obviously, a man in the street cannot make an order under the Act. Therefore the question that has arisen in the present case cannot be answered simply by saying that words "under the Act" refer to the word "order" alone. It cannot be that an order under the Act can be made by any officer whatsoever. If the contention of the learned Advocate-General was right, then even an order made by the Government itself under Section 21(4) would be liable to interference under Section 42, but as already stated he concedes that this cannot be done. Quite clearly Section 42, does not contemplate all orders whatsoever made under the Act.

19. The learned Advocate-General further said that when the legislature amended Section 42 by Act 27 of 1960 it had before it the decision in *Lakha Singh case*² and as it did not expressly provide to the contrary, it must be deemed to have approved of the interpretation put upon the section similar to Section 42 by that case. He referred us to a passage in *Ramnandan Prasad Narain Singh v. Mahanth Kapildeo Ram*³ in support of this contention. In that case a somewhat obscure text in a Bihar Statute had been interpreted by the High Court of Patna consistently from the beginning, that is, from a time soon after its enactment, in a certain way and this Court held in view of the obscurity in the text and the inaction of the legislature over a number of years that it could be legitimately inferred that the High Court had correctly interpreted the intention of the legislature. Without being understood as saying that such an inference must always be made, we would like to point out that the present is an entirely different case. Here there is no unanimity of opinion as regards the interpretation of the statute concerned. At least one Judge, namely, Grover, J. was unable to accept the view that was adopted in *Lakha Singh case*². That learned Judge said, "The use of the expression 'officer' by necessary implication means that the officer should have exercised power as such and not by virtue of the delegation made by the State Government.": see *Lakha Singh case*² p. 159. With this view we entirely agree. Furthermore, the present petition was pending in this Court when the Act was amended and the legislature might have thought that it was unnecessary to amend the statute to indicate that the view in *Lakha Singh case*² was wrong for this Court would correct that error.

20. It was lastly said that it may so happen that an order under Section 21(4) might give rise to a chain of reactions which can only be coped with by an order made under Section 42. The precise contention is not very clear to us. This contention appears to have been accepted by Bishan Narain, J. in the judgment on which *Lakha Singh case*² is based where he said, "The changes in allotment in consolidation

proceedings often produce a claim (*sic*) of reactions and affect a number of persons and the rights of parties cannot always be satisfactorily adjusted in an appeal under Section 20(4). In such cases Section 41 is the only provision which can be utilised to achieve this object." Section 41 referred to by the learned Judge corresponds, as we have earlier said, to Section 42 of our Act. Suppose the position is that in view of the chain reactions started, the order made under Section 21(4) was better recalled. Now suppose the order under Section 21(4) is made by the Government itself, then admittedly nothing can be done about it under Section 42 to give effect to any chain reactions. There is no reason to think that if that order happens to be made by an officer to whom Government's powers under Section 21(4) are delegated that should make any difference. The harm, if any, in each case would be the same, and there is no reason why the legislature should have provided for a remedy in one case and not in the other. It might however be reasonably thought that when an appeal is being heard under Section 21(4) either by the Government or by an officer, the authority concerned will before making the order in the appeal consider the chain reactions that the order might cause and then decide not to make the order at all or to make the order and give effect to the chain reactions by interfering under Section 42 with other orders. Even on the interpretation that we suggest all necessary chain reactions might be given effect to. This reasoning does not assist the respondents at all.

21. We therefore think that the order impugned in this case which was made on July 21, 1956 under Section 42 was entirely without jurisdiction and must be treated as a nullity. No effect can be given to it and the petitioner is entitled to an order quashing it.

22. Then it is said that even so, no writ can be issued quashing the order as it cannot be said to affect the petitioner's right to property. The contention in short is that the order affects no fundamental right and therefore no petition under Article 32 is maintainable. This objection to the petition is also without foundation. From what we have earlier said about the provisions of the Act it would appear that the object of the scheme is to give to a person affected by it right in the lands allotted to him under the repartition made pursuant to the scheme in the place of his right in lands which were pooled and which he previously held. Now under Sections 23, 24 and 25 taken together, the original right to lands comes to an end and a right to the substituted lands springs up upon possession being delivered of the new allotments as mentioned in these sections. It is not necessary to refer to the provisions of these sections in detail for this, it is agreed, is the substance of them. It may be that possession has not yet been delivered in terms of the Act and, therefore, in a manner of speaking, the petitioner's original right to land has not yet come to an end nor has his new right come into existence. But it is obvious that if the impugned order is allowed to stand, then it is the intention of the respondent State and the respondent Hari Singh to carry it into effect. If the impugned order stands, Hari Singh would be entitled to ask for delivery of possession of the lands given to him under that order and respondent State would be bound to give him such possession. The petitioner would have no means of opposing possession being so given. Immediately upon such delivery of possession the petitioner's original right to his lands would disappear. Therefore it seems to us that the inevitable result of the order is to affect the petitioner's right to property illegally. It may be that just now the right has not been affected and there is only a threat that it will be affected. But we think that the threat is sufficiently serious and the petitioner is not bound to wait till his right has actually been affected more particularly as it is not disputed that it

would inevitably be affected.

23. In the result we would allow the petition and issue a writ quashing the order purported to be made by the Director, Consolidation of Holdings, Punjab on July 21, 1956 under Section 42 of the Act. The petitioner will be entitled to the costs of this petition.

KAPUR, J.—The decision of this case depends upon the construction of two provisions of the East Punjab Holdings (Consolidation and Prevention of Fragmentation) Act, 1948, Act 50 of 1948, hereinafter termed "the Act"; those provisions are Sections 21 (4) and 42. The former section confers on the State Government appellate powers and the latter the power to call for "proceedings" for the purpose of satisfying itself as to the legality and propriety of any order passed under the Act by any officer acting under the Act. The respective submissions of the parties before us are these according to the petitioner once the power of appeal in regard to an order of the Settlement Officer is exercised under Section 21(4) by the State Government or its delegate to whom power is delegated under Section 41 the State Government cannot exercise the power of control contained in Section 42 of calling for the record and correcting the errors of its officers? According to the respondents' submission the two powers of appeal and control are separate and distinct powers and if they are delegated to two different officers as they were in the present case then the exercise of one power (under Section 21(4)) does not exhaust the Government's power or that of its delegate under Section 42 of the Act. In order to resolve the controversy it is necessary to refer to some of the provisions and the objects of the Act.

2. As the long title of the Act shows the underlying object of the Act is the consolidation of holdings and prevention of fragmentation and thus to improve agriculture in the State. By a series of partitions since the founding of the various villages in the State the holdings had become fragmented and uneconomic for the purpose of efficient cultivation. The Act provides the remedy for this by means of consolidation of holdings. In order to effectuate that object, the Act has created a machinery which provides for putting all the holdings in a village in hotch-potch evaluating each holding and then repartitioning in accordance with that evaluation with a provision for compensation to equalise the values.

3. Chapter III deals with consolidation of holdings. Under that Chapter first the State Government declares its intention to make a scheme for consolidation of holdings and then a scheme is prepared by the Consolidation Officer after obtaining the advice of the landowners of the estate. Under Section 15 the scheme has to provide for compensation. After the scheme is prepared it can be objected to by any landowner and is liable to be amended by the Consolidation Officer and the Settlement Officer who is a higher official. The scheme as finally drafted has to be confirmed by the Settlement Officer. After the scheme is prepared and confirmed and published, the land is put in hotch-potch and repartitioned in accordance with the scheme of consolidation and with the advice of the landowners.

4. Here comes the hierarchy of officers who are empowered to look into the grievances of any aggrieved person in regard to repartition and that is provided in Section 21 of the Act. An objection can be lodged in the first instance by any person aggrieved by the repartition before the Consolidation Officer and any person aggrieved by the order of the Consolidation Officer can appeal to the Settlement Officer (Consolidation) and if any person is aggrieved by his order he can take the

appeal within the time specified to the State Government and there the machinery for appeals stops and subject to that appellate order the order of the Settlement Officer is final.

5. After repartition has been finally sanctioned under the provisions of the Act and has been effected a new record of rights has to be prepared and then if all the landowners agree to enter into possession in accordance with the scheme of repartition the possession is given to the landowners and if they do not agree to enter into possession then possession is to be taken by the landowners at the commencement of the agricultural year following the date of the publication of the final scheme and they have to be put into physical possession of the holdings and would be entitled to the standing crop on payment of such compensation as may be determined. Under Section 24 as soon as possession is taken in accordance with the provisions of the Act the scheme shall be deemed to have come into force. Provision is then made in regard to encumbrances of the landowners and tenants. Provision is also made for apportionment of compensation.

6. Now we shall deal with Chapter V which is headed "General". For the administration of the Act, Section 41 empowers the State Government to appoint such persons as it thinks fit and it may by notification delegate any of its powers under the Act to any of its officers either by name or designation. Section 42 confers power on the State Government to call for the proceedings i.e. any order passed, scheme prepared or confirmed or repartition made under the Act by any officer acting under the Act to satisfy itself as to the legality and propriety of orders passed by its officers and to pass such orders as it thinks fit. Section 43 provides that except as provided in the Act no appeal or revision shall lie from any order passed under the Act and under Section 44 no civil suit is entertainable in respect of any matter which the State Government or any other officer is empowered to determine, decide or dispose of under the Act and under Section 45 no suit is maintainable in respect of the exercise of any power or discretion conferred by the Act or against any public servant or person duly appointed or authorized under the Act in respect of anything done in good faith or purporting to be done under the Act and Section 46 is the rule-making power. This, in short, is the scheme of the Act.

7. It is to be noticed that the Act provides under Section 42 an overall control of the State Government at all stages of consolidation proceedings. It is the State Government which has to specify the estate for the purposes of the Act and it has the power to determine and revise at any time the standard areas under Section 5 of the Act. The scheme for consolidation of holdings has to be finally sanctioned by the State Government or by its delegate and after the scheme is sanctioned repartition is to take place so as to allot lands to the people in accordance with the value of their original holdings with such compensation as may be necessary and if any person is dissatisfied with the repartition he can appeal first to the Consolidation Officer, then to the Settlement Officer and thereafter to the State Government but the appeals are not confined to the person aggrieved by the repartition scheme; any person who may be aggrieved by the order of Consolidation Officer may, under Section 21(2) of the Act appeal to the Settlement Officer under Section 21(3) and any person who is aggrieved by that order, who may not necessarily be the person who started the proceedings before the Consolidation Officer can appeal to the State Government. Section 21 reads as follows:

"21. (1) The Consolidation Officer shall after obtaining the advice of the landowners of the estate or estates concerned, carry out repartition in accordance with the

scheme of consolidation confirmed under Section 20, and the boundaries of the holdings as demarcated shall be shown on the shajra which shall be published in the prescribed manner in the estate or estates concerned.

(2) Any person aggrieved by the repartition may file a written objection within fifteen days of the publication before the Consolidation Officer who shall after hearing the objector pass such orders as he considers proper confirming or modifying the scheme.

(3) Any person aggrieved by the order of the Consolidation Officer under sub-section (2) may within one month of that order file an appeal before the Settlement Officer (Consolidation) who shall after hearing the appellant pass such order as he considers proper."

The effect of this section is to give a right to every person who is aggrieved by any order passed either at the time of the repartition or by the order of the Consolidation Officer or by the order of the Settlement Officer to object and get relief. The reason for this is that the order passed by the Consolidation Officer in favour of a person who applies under Section 21(2) may start a chain reaction which may affect the rights of others, like any other ordinary partition proceedings may do, and therefore any person aggrieved has been given the right to take objection under the various provisions of Section 21. When the appellate power of the State Government is exercised by an officer to whom powers are delegated under Section 41 which provides:

"41. (1) The State Government may for the administration of this Act, appoint such persons as it thinks fit, and may by notification delegate any of its powers or functions under this Act to any of its officers either by name or designation.

(2) A Consolidation Officer or a Settlement Officer (Consolidation) may, with the sanction of the State Government, delegate any of its powers or functions under this Act to any person in the service of the State Government."

The officer though exercising such powers as the State Government itself possesses is still an officer of the State Government and has all the protection which is given by Section 45 of the Act and his order is final as provided in Section 43. Any order passed by him as an Appellate Authority is an order in regard to repartition which has to be taken into consideration for the purposes of bringing the scheme into effect under Section 24 of the Act. Thus he does not cease to be an officer of the State Government even though in disposing of appeals he is exercising delegated powers.

Section 42 of the Act provides:

"42. The State Government may at any time for the purpose of satisfying itself as to the legality or propriety of any order passed, scheme prepared or confirmed or repartition made by any officer under this Act call for and examine the record of any case pending before or disposed of by such officer and may pass such order in reference thereto as it thinks fit.

Provided that no order, scheme or repartition shall be varied or reversed without giving the parties interested notice to appear and opportunity to be heard except in cases where the State Government is satisfied that the proceedings have been

vitiated by unlawful consideration."

Now this power of the State Government is distinct from the power under Section 21 (4) and is in the nature of revision. This gives an overall control to the State Government to see that the orders passed by its officers are legal and are proper because one illegal or improper order may start a chain of reactions which may disturb the whole scheme of consolidation and prevent its coming into effect. One order passed at any stage under Section 21 of the Act by which a landowner gets more than his share or is given a different area to that which is provided in the repartition scheme may lead to the undoing of the whole scheme and may, set at naught the whole scheme of consolidation. It is for that purpose that the State Government has been given the power, under Section 42 which is further clear from the fact that under the proviso to Section 42 the Government is expressly given the power to set aside proceedings ex parte in regard to which it is satisfied that there has been an element of unlawful consideration. This would apply equally to an order under Section 21(4) by a delegate as to any other order improperly obtained.

8. The Government has necessarily to act through its officers and as consolidation has to take place in several villages, where the rights of a large number of landowners are affected, it cannot always appoint as a final Appellate Authority, persons who correspond to a Financial Commissioner under the Land Revenue Act of the Punjab; and as the orders of such officers become immune from challenge in courts and can in certain cases affect the whole scheme the State Government has been given the power of overall control over all actions of its officers and at all stages. In the present case the officer who exercised the appellate power was Mr Avtar Singh Brar, Assistant Director, Consolidation of Holdings, Ambala. Naturally the Government had to appoint an officer of a higher status to see that no improper or illegal order was passed and for that purpose its powers under Section 42 were delegated to the Director of Consolidation of Holdings.

9. The language of Section 42 shows that an overall control is given to the State Government over all consolidation proceedings and at all stages. In that section, are mentioned firstly, any order passed by an officer, secondly a scheme prepared or confirmed, thirdly a partition made by any officer under the Act. They are all equally subject to the power of the State Government under Section 42. The order under Section 21(4) by a delegate is an order of repartition and would even apart from the fact that it is an order of an officer by subject to the revisional powers of the State Government under Section 42. Therefore the statute must be taken to have authorized the State Government to reconsider the scheme confirmed by its delegate. If in that case the power is exercisable by the State Government there does not seem to be any reason why that power is not exercisable when its delegate passes an order, under Section 21(4) and thus makes an order in regard to repartition. So read the extent of the power of the State Government under Section 42 extends equally to any order passed by its officers whether of confirmation of a scheme or of repartition and whether the power is exercised by the officer making the order acting under authority expressly given to him under the Act or it is delegated to him by the State Government under Section 41 of the Act. If this power were not to be inferred from Section 42 then no kind of illegality or impropriety would be liable to correction. This argument receives further support from the power given to the State Government where it is satisfied that proceedings have been vitiated by unlawful consideration. If this power was not there then any order howsoever obtained would remain immune from all control of higher officials and

would lead to a great deal of inconvenience, if not injustice.

10. The view of the Punjab High Court in *Lakha Singh v. Director, Consolidation of Holdings, Punjab*² which was a case under a similar provision of the Pepsu State in our opinion is a correct interpretation of Section 41 of the Pepsu Act corresponding to Section 42 of the Act. In that case it was held that the appellate powers are concerned with the grievances of the appellant and those who are arrayed as parties in the appeal but Section 42 gives an overriding power to the Government to consider any order of its officers under the Act and to make such orders as would subserve the objects and purposes of consolidation proceedings. The change in allotment, as a result of an appeal, may produce a chain of reactions and effect the rights of a number of persons which cannot be satisfactorily adjusted in appeal but under its general powers the Government may make such orders as would prevent the right of all or a large number of landowners from being affected. Without such a power, as we have said above, the whole scheme of consolidation may fail because there would be no remedy in a civil court and finality being given to the appellate order would produce an impasse which must necessarily defeat the object of the Act and the process of consolidation.

11. In this view of the matter, in our opinion, this petition is without force and is dismissed with costs.

Order

In view of the majority opinion the writ petition is allowed with costs.

¹ LR (1890) 25 QBD 391

² AIR 1959 Pun 157

³ (1951) SCR 138, 144

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(1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri LJ 329

(Under Article 32 of the Constitution of India for the enforcement of Fundamental Rights).

Appeal from the Judgment and Order dated 6th December, 1960, of the Gujarat High Court in Special Civil Application No. 434 of 1960
Kharak Singh v. State of U.P.

(Under Article 32 of the Constitution of India for the enforcement of Fundamental Rights).

KHARAK SINGH . . Petitioner;
Versus

STATE OF U.P. AND OTHERS . . Respondents.

Petition No. 856 of 1961, decided on 18th day of December, 1962.

Present:

THE HON'BLE THE CHIEF JUSTICE BHUVANESHWAR PRASAD SINHA

THE HON'BLE JUSTICE S.J. IMAM

THE HON'BLE, . JUSTICE K. SUBBA RAO

THE HON'BLE JUSTICE J.C. SHAH

THE HON'BLE JUSTICE N. RAJAGOPALA AYYANGAR

THE HON'BLE JUSTICE J.R. MUDHOLKAR

For the Petitioner: J.P. Goyal, Advocate.

For the Respondents: K.S. Hajela, Senior Advocate (C.P. Lal, Advocate, with him).

The Judgments of the Court were delivered by

AYYANAGAR, J.— This petition under Article 32 of the Constitution challenges the constitutional validity of Chapter 22 of the U.P. Police Regulations and the powers conferred upon police officials by its several provisions on the ground that they violate the right guaranteed to citizens by Articles 19(1)(d) and 21 of the Constitution.

2. To appreciate the contention raised it is necessary to set out the facts averred on the basis of which the fundamental right of the petitioner is said to be violated, as well as the answers by the respondent-State to these allegations. The petitioner Kharak Singh was challaned in a case of dacoity in 1941 was released under Section 169 of the Criminal Procedure Code as there was no evidence against him. On the basis of the accusation made against him he states that the police have opened a "history-sheet" in regard to him. Regulation 228 which occurs in Chapter 22 of the Police Regulation defines "history-sheets" as "the personal records of criminals under surveillance". That regulation further directs that "history-sheets" should be opened only for persons who are or are likely to become habitual criminals or the aiders or abettors of such criminals. These history-sheets are of two classes: Class A for dacoits, burglars, cattle-thieves, and railway-goods-wagon thieves, and Class B for those who are confirmed and professional criminals who commit crimes other than dacoity, burglary, etc. like professional cheats. It is admitted that a history-sheet in

Class A has been opened for the petitioner and he is therefore "under surveillance."

3. The petitioner describes the surveillance to which he has been subjected thus: frequently the chaukidar of the village and sometimes police constables enter his house, knock and shout at his door, wake him up during the night and thereby disturb his sleep. On a number of occasions they have compelled him to get up from his sleep and accompany them to the police station to report his presence there. When the petitioner leaves his village for another village or town, he has to report to the chaukidar of the village or at the police station about his departure. He has to give them information regarding his destination and the period within which he would return. Immediately the police station of his destination is contacted by the police station of his departure and the former puts him under surveillance in the same way as the latter. There are other allegations made about misuse or abuse of authority by the chaukidar or the police officials but these have been denied and we do not consider them made out for the purposes of the present petition. If the officials outstep the limits of their authority they would be violating even the instructions given to them, but it looks to us that these excesses of individual officers which are wholly unauthorised could not be complained of in a petition under Article 32.

4. In deciding this petition we shall proceed upon the basis that the officers conformed strictly to the terms of the Regulations in Chapter 22 properly construed and discard as exaggerated or not proved the incidents or pieces of conduct on the part of the authorities which are alleged in the petition but which have been denied. As already pointed out it is admitted that a history-sheet had been opened and a record as prescribed by the Regulations maintained for the petitioner and that such action as is required to be taken in respect of history-sheets of Class A into which the petitioner fell under the classification made in Chapter 22 of the Police Regulations is being taken in regard to him. It is stated in the counter affidavit that the police keep a confidential watch over the movements of the petitioner as directed by the Regulations in the interest of the general public and for the maintenance of public order.

5. Before entering on the details of these regulations it is necessary to point out that the defence of the State in support of their validity is two-fold: (1) that the impugned regulations do not constitute an infringement of any of the freedoms guaranteed by Part III of the Constitution which are invoked by the petitioner, and (2) that even if they were, they have been framed "in the interests of the general public and public order" and to enable the police to discharge its duties in a more efficient manner and were therefore "reasonable restrictions" on that freedom. Pausing here it is necessary to point out that the second point urged is without any legal basis for if the petitioner were able to establish that the impugned regulations constitute an infringement of any of the freedoms guaranteed to him by the Constitution then the only manner in which this violation of the fundamental right could be defended would be by justifying the impugned action by reference to a valid law i.e. be it a statute, a statutory rule or a statutory regulation. Though learned Counsel for the respondent started by attempting such a justification by invoking Section 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Chapter 22 had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be "a law" which the State is entitled to make under the relevant clauses 2 to 6 of Article 19 in order to regulate or curtail fundamental rights

guaranteed by the several sub-clauses of Article 19(1), nor would the same be "a procedure established by law" within Article 21. The position therefore is that if the action of the police which is the arm of the executive of the State is found to infringe any of the freedoms guaranteed to the petitioner would be entitled to the relief of mandamus which he seeks, to restrain the State from taking action under the regulations.

6. There is one other matter which requires to be clarified even at this stage. A considerable part of the argument addressed to us on behalf of the respondent was directed to showing that the regulations were reasonable and were directed only against those who were on proper grounds suspected to be of proved anti-social habits and tendencies and on whom it was necessary to impose some restraints for the protection of society. We entirely agree that if the regulations had any statutory basis and were a "law" within Article 13(3), the consideration mentioned might have an overwhelming and even decisive weight in establishing that the classification was rational and that the restrictions were reasonable and designed to preserve public order by suitable preventive action. But not being any such "law", these considerations are out of place and their constitutional validity has to be judged on the same basis as if they were applied against every one including respectable and law-abiding citizens not being or even suspected of being, potential dangers to public order.

7. The sole question for determination therefore is whether "surveillance" under the impugned Chapter 22 of the U.P. Police Regulations constitutes an infringement of any of a citizen's fundamental rights guaranteed by Part III of the Constitution. The particular Regulation which for all practical purposes defines "surveillance" is Regulation 236 which reads:

"without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures:

- (a) Secret picketing of the house or approaches to the houses of suspects;
- (b) domiciliary visits at night;
- (c) through periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation;
- (d) the reporting by constables and chaukidars of movements and absences from home;
- (e) the verification of movements and absences by means of inquiry slips;
- (f) the collection and record on a history-sheet of all information bearing on conduct."

8. Regulation 237 provides that all "history-sheet men" of Class A (under which the petitioner falls) "starred" and "unstarred", would be subject to all these measures of surveillance. The other Regulations in the chapter merely elaborate the several items of action which make up the "surveillance" or the shadowing but we consider that nothing material turns on the provisions or their terms.

9. Learned Counsel for the petitioner urged that the acts set out in clauses (a) to (f) of Regulation 236 infringed the freedom guaranteed by Article 19(1)(d) "to move freely throughout the territory of India" and also that guaranteeing "personal liberty" in Article 21 which runs:

"No person shall be deprived of his life or personal liberty except according to procedure established by law."

10. We shall now consider each of these clauses of Regulation 236 in relation to the "freedoms" which it is said they violate:

(a) Secret picketing of the houses of suspects.—

It is obvious that the secrecy here referred to is secrecy from the suspect; in other words its purpose is to ascertain the identity of the person or persons who visit the house of the suspect, so that the police might have a record of the nature of the activities in which the suspect is engaged. This, of course, cannot in any material or palpable form affect either the right on the part of the suspect to "move freely" nor can it be held to deprive him of his "personal liberty" within Article 21. It was submitted that if the suspect does come to know that his house is being subjected to picketing, that might affect his inclination to move about or that in any event it would prejudice his "personal liberty". We consider that there is no substance in this argument. In dealing with a fundamental right such as the right to free movement or personal liberty, that only can constitute an infringement which is both direct as well as tangible and it could not be that under these freedoms the Constitution-makers intended to protect or protected mere personal sensitiveness. It was then suggested that such picketing might have a tendency to prevent, if not actually preventing friends of the suspect from going to his house and would thus interfere with his right "to form associations" guaranteed by Article 19(1)(c). We do not consider it necessary to examine closely and determine finally the precise scope of the "freedom of association" and particularly whether it would be attracted to a case of the type now under discussion, since we are satisfied that "picketing" is used in clause (a) of this Regulation not in the sense of offering resistance to the visitor physical or otherwise — or even dissuading him, from entering the house of the suspect but merely of watching and keeping a record of the visitors. This interpretation we have reached (a) on the basis of the provisions contained in the later Regulations in the Chapter, and (b) because more than even the express provisions, the very purpose of the watching and the secrecy, which is enjoined would be totally frustrated if those whose duty it is to watch contacted the visitors, made their presence or identity known and tried to persuade them to any desired course of action.

(b) Domiciliary visits at night.—

"Domiciliary visit" is defined in the *Oxford English Dictionary* as "Visit to a private dwelling, by official persons, in order to search or inspect it." *Webster's Third New International Dictionary* defines the word as "Visit to a private dwelling (as for searching it) under authority." The definition in *Chambers Twentieth Century Dictionary* is almost identical—"Visit under authority, to a private house for the purpose of searching it." These visits in the context of the provisions in the Regulations are for the purpose of making sure that the suspect is staying at home or whether he has gone out, the latter being presumed in this class of cases, to be

with the probable intent of committing a crime. It was urged for the respondent that the allegations in the petition regarding the manner in which "domiciliary visits" are conducted viz. that the policeman or chaukidar enters the house and knocks at the door at night and after awakening the suspect makes sure of his presence at his home had been denied in the counter-affidavit and was not true, and that the policemen as a rule merely watch from outside the suspect's house and make enquiries from third persons regarding his presence or whereabouts. We do not consider that this submission affords any answer to the challenge to the constitutionality of the provision. In the first place, it is clear that having regard to the plain meaning of the words "domiciliary visits", the police authorities are authorised to enter the premises of the suspect, knock at the door and have it opened and search it for the purpose of ascertaining his presence in the house. The fact that in any particular instance or even generally they do not exercise to the full the power which the regulation vests in them, is wholly irrelevant for determining the validity of the regulation since if they are so minded they are at liberty to exercise those powers and do those acts without outstepping the limits of their authority under the regulations.

Secondly, we are, by no means, satisfied that having regard to the terms of Regulation 236(b) the allegation by the petitioner that police constables knock at his doors and wake him up during the night in the process of assuring themselves of his presence at home is entirely false, even if the other allegations regarding his being compelled to accompany the constables during the night to the police station be discarded as mere embellishment.

The question that has next to be considered is whether the intrusion into the residence of a citizen and the knocking at his door with the disturbance to his sleep and ordinary comfort which such action must necessarily involve, constitute a violation of the freedom guaranteed by Article 19(1)(d) or "a deprivation" of the "personal liberty" guaranteed by Article 21. Taking first Article 19(1)(d) the "freedom" here guaranteed is a right "to move freely" throughout the territory of India. Omitting as immaterial for the present purpose the last words defining the geographical area of the guaranteed movement, we agree that the right to "move" denotes nothing more than a right of locomotion, and that in the context the adverb "freely" would only connote that the freedom to move is without restriction and is absolute i.e. to move wherever one likes, whenever one likes and however one likes subject to any valid law enacted or made under clause 5. It is manifest that by the knock at the door, or by the man being "roused from his sleep, his locomotion is not impeded or prejudiced in any manner. Learned Counsel suggested that the knowledge or apprehension that the police were on the watch for the movements of the suspect, might induce a psychological inhibition against his movements but, as already pointed out, we are unable to accept the argument that for this reason there is an impairment of the "free" movement guaranteed by sub-clause (d). We are not persuaded that counsel is right in the suggestion that this would have any effect even on the mind of the suspect and even if in any particular case it had the effect of diverting or impeding his movement, we are clear that the freedom guaranteed by Article 19(1)(d) has reference to something tangible and physical rather and not to the imponderable effect on the mind of a person which might guide his action in the matter of his movement or locomotion.

11. The content of Article 21 next calls for examination. Explaining the scope of the words "life" and "liberty" which occurs in the 5th and 14th Amendments to the U.S.

Constitution reading "No person ... shall be deprived of life, liberty or property without due process of law", to quote the material words, on which Article 21 is largely modelled, Field, J. observed:

"By the term 'life' as here used something more is meant than mere animal existence. The inhibition against its deprivation extends to all these limits and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body or amputation of an arm or leg or the putting out of an eye or the destruction of any other organ of the body through which the soul communicates with the outer world ... By the term liberty, as used in the provision something more is meant than mere freedom from physical restraint or the bounds of a prison."

It is true that in Article 21, as contrasted with the 4th and 14th Amendment in the U.S., the word "liberty" is qualified by the word "personal" and therefore its content is narrower. But the qualifying adjective has been employed in order to avoid overlapping between those elements or incidents of "liberty" like freedom of speech, or freedom of movement etc. already dealt with in Article 19(1) and the "liberty" guaranteed by Article 21 — and particularly in the context of the difference between the permissible restraints or restrictions which might be imposed by sub-clauses 2 to 6 of the Article on the several species of liberty dealt with in the several clauses of Article 19(1). In view of the very limited nature of the question before us it is unnecessary to pause to consider either the precise relationship between the "liberties" in Article 19(1)(a) & (d) on the one hand and that in Article 21 on the other, or the content and significance of the words "procedure established by law" in the latter Article, both of which were the subject of elaborate consideration by this Court in *A.K. Gopalan v. State of Madras*.¹ In fact, in *Gopalan case*¹ there was unanimity of opinion on the question that if there was no enacted law, the freedom guaranteed by Article 21 would be violated, though the learned Judges differed as to whether any and every enacted law satisfied the description or requirements of "a procedure established by law".

12. Before proceeding further a submission on behalf of the respondent requires notice. It was said that if the act of the police involved a trespass to property i.e. the trespass involved in the act of the police official walking into the premises of the petitioner and knocking at the door, as well as the disturbance caused to him, might give rise to claims in tort, since the action was not authorised by law and that for these breaches of the petitioner's rights damages might be claimed and recovered from the tortfeasor, but that the same could not constitute an infraction of a fundamental right. Similarly it was urged that the petitioner or persons against whom such action was taken might be within their rights in ejecting the trespasser and even use force to effectuate that purpose, but that for what was a mere tort of trespass or nuisance the jurisdiction of this Court under Article 32 could not be invoked. These submissions proceed on a basic fallacy. The fact that an act by the State executive or by a State functionary acting under a pretended authority gives rise to an action at common law or even under a statute and that the injured citizen or person may have redress in the ordinary courts is wholly immaterial and, we would add, irrelevant for considering whether such action is an invasion of a fundamental right. An act of the State executive infringes a guaranteed liberty only when it is not authorised by a valid law or by any law as in this case, and every such illegal act would obviously give rise to a cause of action — civil or criminal at the instance of the injured person for redress. It is wholly erroneous to assume that before the jurisdiction of this Court under Article 32 could be invoked the applicant

must either establish that he has no other remedy adequate or otherwise or that he has exhausted such remedies as the law affords and has yet not obtained proper redress, for when once it is proved to the satisfaction of this Court that by State action the fundamental right of a petitioner under Article 32 has been infringed, it is not only the right but the duty of this Court to afford relief to him by passing appropriate orders in that behalf.

13. We shall now proceed with the examination of the width, scope and content of the expression "personal liberty" in Article 21. Having regard to the terms of Article 19(1)(d), we must take it that that expression is used as not to include the right to move about or rather of locomotion. The right to move about being excluded its narrowest interpretation would be that it comprehends nothing more than freedom from physical restraint or freedom from confinement within the bounds of a prison; in other words, freedom from arrest and detention, from false imprisonment or wrongful confinement. We feel unable to hold that the term was intended to bear only this narrow interpretation but on the other hand consider that "personal liberty" is used in the Article as a compendious term to include within itself all the varieties of rights which go to make up the "personal liberties" of man other than those dealt with in the several clauses of Article 19(1). In other words, while Article 19(1) deals with particular species or attributes of that freedom, "personal liberty" in Article 21 takes in and comprises the residue. We have already extracted a passage from the judgment of Field, J. in *Munn v. Illinois*² where the learned Judge pointed out that "life" in the 5th and 14th Amendments of the U.S. Constitution corresponding to Article 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs his arms and legs etc. We do not entertain any doubt that the word "life" in Article 21 bears the same signification. Is then the word "personal liberty" to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the constitution which would point to such vital words as "personal liberty" having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any pro-conceived notions or doctrinaire constitutional theories. Frankfurter, J. observed in *Wolf v. Colorado*.³

"The security of one's privacy against arbitrary intrusion by the police ... is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples ... We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guarantee of the Fourteenth Amendment."

14. Murphy, J. considered that such invasion was against "the very essence of a

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scheme of ordered liberty."

15. It is true that in the decision of the U.S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

and that our Constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man an ultimate essential of ordered liberty, if not of the very concept of civilisation. An English Common Law maxim asserts that "every man's house is his castle" and in *Semayne case*⁴ where this was applied, it was stated that "the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose." We are not unmindful of the fact that *Semayne case*⁴ was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of "personal liberty" which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

16. In our view clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no "Law" on which the same could be justified it must be struck down as unconstitutional.

17. Clauses (c), (d) and (e) may be dealt with together. The actions suggested by these clauses are really details of the shadowing of the history-shooters for the purpose of having a record of their movements and activities and the obtaining information relating to persons with whom they come in contact or associate, with a view to ascertain the nature of their activities. It was urged by learned Counsel that the shadowing of a person obstructed his free movement or in any event was an impediment to his free movement within Article 19(1)(d) of the Constitution. The argument that the freedom there postulated was not confined to a mere physical restraint hampering movement but that the term "freely" used in the Article connoted a wider freedom transcending mere physical restraints, and included psychological inhibitions we have already considered and rejected. A few minor matters arising in connection with these clauses might now be noticed. For instance, clauses (d) & (e) refer to the reporting of the movements of the suspect and his absence from his home and the verification of movements and absences by means of enquiries. The enquiry for the purpose of ascertaining the movements of the suspect might conceivably take one of two forms: (1) an enquiry of the suspect himself, and (2) of others. When an enquiry is made of the suspect himself, the question mooted was that some fundamental right of his was violated. The answer must be in the negative because the suspect has the liberty to answer or not to answer the question for *ex concessis* there is no law on the point involving him any liability-civil or criminal — if he refused to answer or remained silent. Does then the fact that an

enquiry is made as regards the movements of the suspect and the facts ascertained by such enquiry are verified and the true facts sifted constitute an infringement of the freedom to move? Having given the matter our best consideration we are clearly of the opinion that the freedom guaranteed by Article 19(1)(d) is not infringed by a watch being kept over the movements of the suspect. Nor do we consider that Article 21 has any relevance in the context as was sought to be suggested by learned Counsel for the petitioner. As already pointed out, the right of privacy is not a guaranteed right under our Constitution and therefore the attempt to ascertain the movements of an individual which is merely a manner in which privacy is invaded is not an infringement of a fundamental right guaranteed by Part III.

18. The result therefore is that the petition succeeds in part and Regulation 236(b) which authorises "domiciliary visits" is struck down as unconstitutional. The petitioner would be entitled to the issue of a writ of mandamus directing the respondent not to continue domiciliary visits. The rest of the petition fails and is dismissed. There will be no order as to costs.

SUBBA RAO, J.— We have had the advantage of perusing the judgment prepared by our learned Brother Rajagopala Ayyangar, J. We agree with him that Regulation 236 (b) is unconstitutional, but we would go further and hold that the entire Regulation is unconstitutional on the ground that it infringes both Article 19(1)(d) and Article 21 of the Constitution.

20. This petition raises a question of far-reaching importance, namely, a right of a citizen of India to lead a free life subject to social control imposed by valid law. The fact that the question has been raised at the instance of an alleged disreputable character shall not be allowed to deflect our perspective. If the police could do what they did to the petitioner, they could also do the same to an honest and law-abiding citizen.

21. Let us at the outset clear the ground. We are not concerned here with a law imposing restrictions on a bad character, for admittedly there is no such law. Therefore, the petitioner's fundamental right, if any has to be judged on the basis that there is no such law. To state it differently, what fundamental right of the petitioner has been infringed by the acts of the police? If he has any fundamental right which has been infringed by such acts, he would be entitled to a relief straightaway, for the State could not justify it on the basis of any law made by the appropriate legislature or the rules made thereunder.

22. The petitioner in his affidavit attributes to the respondents the following acts—

"Frequently the chaukidar of the village and sometimes police constables awake him in the night and thereby disturb his sleep. They shout at his door and sometimes enter inside his house. On a number of occasions they compel him to get up from his sleep and accompany them to the police station, Civil Lines, Meerut, (which is three miles from the petitioner's village) to report his presence there. When the petitioner leaves his village for another village or town, he has to report to the chaukidar of the village or at the police station about his departure. He has to give information regarding his destination and the period within which he will return. Immediately the police station of his destination is contacted by the police station of his departure and the former puts him under surveillance in the same way as the latter

does."

"It may be pointed out that the chaukidar of the village keeps a record of the presence and absence of the petitioner in a register known as chaukidar's Crime Record Book."

"All the entries in this book are made behind the petitioner's back and he is never given any opportunity of examining or inspecting these records."

There are other allegations made about the misuse or abuse of authority by the chaukidar or the police officials.

23. In the counter-affidavit filed by the respondents it is admitted that the petitioner is under the surveillance of the police, but the allegations of abuse of powers are denied. A perusal of the affidavit and the counter-affidavit shows that the petitioner tries to inflate the acts of interference by the police in his life, while the respondents attempt to deflate it to the minimum. In the circumstances we would accept only such of the allegations made by the petitioner in his affidavit which are in conformity with the act of surveillance described by Regulation 236 of Chapter 22 of the U.P. Police Regulations. The said Regulation reads:

"Without prejudice to the right of Superintendents of Police to put into practice any legal measures, such as shadowing in cities, by which they find they can keep in touch with suspects in particular localities or special circumstances, surveillance may for most practical purposes be defined as consisting of one or more of the following measures:

- (a) Secret picketing of the house or approaches to the houses of suspects;
- (b) domiciliary visits at night;
- (c) through periodical inquiries by officers not below the rank of sub-inspector into repute, habits, associations, income, expenses and occupation;
- (d) the reporting by constables and chaukidars of movements and absences from home;
- (e) the verification of movements and absences by means of inquiry slips;
- (f) the collection and record on a history sheet of all information bearing on conduct."

Regulation 237 provides that all "history-sheet men" of Class A, "starred and "unstarred", would be subject to all the said measures of surveillance. It is common case that the petitioner is a Class A history-sheeter and, therefore, he is subject to the entire field of surveillance.

24. Before we construe the scope of the said Regulation, it will be necessary to ascertain the meaning of some technical words used therein. What does the expression "surveillance" mean? Surveillance conveys the idea of supervision and close observance. The person under surveillance is not permitted to go about unwatched. Clause (a) uses the expression "secret-picketing". What does the expression mean? Picketing has many meanings. A man or a party may be stationed by trade union at a workshop to deter would-be workers during strike. Social workers may stand at a liquor shop to intercept people going to the shop to buy liquor and

prevail upon them to desist from doing so. Small body of troops may be sent out as a picket to watch for the enemy. The word "picketing" may, therefore, mean posting of certain policemen near the house or approaches of the house of a person to watch his movements and to prevent people going to his house or having association with him. But the adjective "secret" qualifies the word "picketing" and to some extent limits its meaning. What does the expression "secret" mean? Secret from whom? Does it mean keeping secret from the man watched as well as from the people who go to his house? Though the expression is not clear, we will assume that secret-picketing only means posting of the police at the house of a person to watch his movements and those of his associates without their knowledge. But in practice, whatever may have been the intention of the authorities concerned, it is well nigh impossible to keep it secret. It will be known to everybody including the person watched.

25. The next expression is "domiciliary visit" at night. Domiciliary means "of a dwelling place". A domiciliary visit is a visit of officials to search or inspect a private house.

26. Having ascertained the meaning of the said three expressions, let us see the operation of the Regulation and its impact on a person like the petitioner who comes within its scope, Policemen were posted near his house to watch his movements and those of his friends or associates who went to his house. They entered his house in the night and woke him up to ascertain whether he was in the house and thereby disturbed his sleep and rest. The officials not below the rank of Sub-Inspector made inquiries obviously from others as regards his habits, associations, income, expenses and the occupation i.e. they got information from others as regards his entire way of life. The constables and the chaukidars traced his movements, shadowed him and made reports to the superiors. In short, his entire life was made an open-book and every activity of his was closely observed and followed. It is impossible to accept the contention that this could have been made without the knowledge of the petitioner or his friends, associates and others in the locality. The attempt to dissect the act of surveillance into its various ramifications is not realistic. Clauses (a) to (f) are the measures adopted for the purpose of supervision or close observation of his movements and are, therefore, parts of surveillance. The question is whether such a surveillance infringes any of the petitioner's fundamental rights.

27. Learned Counsel for the petitioner contends that by the said act of surveillance the petitioner's fundamental rights under clauses (a) and (d) of Article 19(1) and Article 21 are infringed. The said Articles read:

"21. No person shall be deprived of his life or personal liberty except according to procedure established by law.

19. (1) All citizens shall have the right—

(a) to freedom of speech and expression;

* * *

(b) to move freely throughout the territory of India."

At this stage it will be convenient to ascertain the scope of the said two provisions and their relation *inter se* in the context of the question raised. Both of them are

distinct fundamental rights. No doubt the expression "personal liberty" is a comprehensive one and the right to move freely is an attribute of personal liberty. It is said that the freedom to move freely is carved out of personal liberty and, therefore, the expression "personal liberty" in Article 21 excludes that attribute. In our view, this is not a correct approach. Both are independent fundamental rights, though there is overlapping. There is no question of one being carved out of another. The fundamental right of life and personal liberty have many attributes and some of them are found in Article 19. If a person's fundamental right under Article 21 is infringed, the State can rely upon a law to sustain the action; but that cannot be a complete answer unless the said law satisfies the test laid down in Article 19(2) so far as the attributes covered by Article 19(1) are concerned. In other words, the State must satisfy that both the fundamental rights are not infringed by showing that there is a law and that it does amount to a reasonable restriction within the meaning of Article 19(2) of the Constitution. But in this case no such defence is available, as admittedly there is no such law. So the petitioner can legitimately plead that his fundamental rights both under Article 19(1)(d) and Article 21 are infringed by the State.

28. Now let us consider the scope of Article 21. The expression "life" used in that Article cannot be confined only to the taking away of life i.e. causing death. In *Munn v. Illinois*⁵, Field, J., defined "life" in the following words:

"Something more than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, of the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world."

The expression "liberty" is given a very wide meaning in America. It takes in all the freedoms. In *Bolling v. Sharpe*⁶, the Supreme Court of America observed that the said expression was not confined to mere freedom from bodily restraint and that liberty under law extended to the full range of conduct which the individual was free to pursue. But this absolute right to liberty was regulated to protect other social interests by the State exercising its power such as police power, the power of eminent domain, the power of taxation etc. The proper exercise of the power which is called the due process of law is controlled by the Supreme Court of America. In India the word "liberty" has been qualified by the word "personal", indicating thereby that it is confined only to the liberty of the person. The other aspects of the liberty have been provided for in other Articles of the Constitution. The concept of personal liberty has been succinctly explained by Dicey in his book on *Constitutional Law*, 9th edn. The learned author describes the ambit of that right at pp. 207-08 thus:

"The right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification."

Blackstone in his *Commentaries on the Laws of England*, Book 1, at p. 134 observes:

"Personal liberty includes the power to locomotion of changing situation, or removing one's person to whatsoever place one's inclination may direct, without imprisonment or restraint, unless by due course of law."

In *A.K. Gopalan case*¹, it is described to mean liberty relating to or concerning the

person or body of the individual; and personal liberty in this sense is the antithesis of physical restraint or coercion. The expression is wide enough to take in a right to be free from restrictions placed on his movements. The expression "coercion" in the modern age cannot be construed in a narrow sense. In an uncivilized society where there are no inhibitions, only physical restraints may detract from personal liberty, but as civilization advances the psychological restraints are more effective than physical ones. The scientific methods used to condition a man's mind are in a real sense physical restraints, for they engender physical fear channelling one's actions through anticipated and expected grooves. So also the creation of conditions which necessarily engender inhibitions and fear complexes can be described as physical restraints. Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his "castle"; it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in *Wolf v. Colorado*² pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. It so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution.

29. This leads us to the second question, namely, whether the petitioner's fundamental right under Article 19(1)(d) is also infringed. What is the content of the said fundamental right? It is argued for the State that it means only that a person can move physically from one point to another without any restraint. This argument ignores the adverb "freely" in clause (d). If that adverb is not in the clause, there may be some justification for this contention; but the adverb "freely" gives a larger content to the freedom. Mere movement unobstructed by physical restrictions cannot in itself be the object of a person's travel. A person travels ordinarily in quest of some objective. He goes to a place to enjoy, to do business, to meet friends, to have secret and intimate consultations with others and to do many other such things. If a man is shadowed, his movements are obviously constricted. He can move physically, but it can only be a movement of an automaton. How could a movement under the scrutinizing gaze of the policemen be described as a free movement? The whole country is his jail. The freedom of movement in clause (d) therefore must be a movement in a free country i.e. in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control. The petitioner under the shadow of surveillance is certainly deprived of this freedom. He can move physically, but he cannot do so freely, for all his activities are watched and noted. The shroud of surveillance cast upon him perforce engender inhibitions in him and he cannot act freely as he would like to do. We would, therefore, hold that the

entire Regulation 236 offends also Article 19(1)(d) of the Constitution.

30. Assuming that Article 19(1)(d) of the Constitution must be confined only to physical movements, its combination with the freedom of speech and expression leads to the conclusion we have arrived at. The act of surveillance is certainly a restriction on the said freedom. It cannot be suggested that the said freedom is also bereft of its subjective or psychological content, but will sustain only the mechanics of speech and expression. An illustration will make our point clear. A visitor, whether a wife, son or friend, is allowed to be received by a prisoner in the presence of a guard. The prisoner can speak with the visitor; but, can it be suggested that he is fully enjoying the said freedom? It is impossible for him to express his real and intimate thoughts to the visitor as fully as he would like. But the restrictions on the said freedom are supported by valid law. To extend the analogy to the present case is to treat the man under surveillance as a prisoner within the confines of our country and the authorities enforcing surveillance as guards, without any law of reasonable restrictions sustaining or protecting their action. So understood, it must be held that the petitioner's freedom under Article 19(1)(a) of the Constitution is also infringed.

31. It is not necessary in this case to express our view whether some of the other freedoms enshrined in Article 19 of the Constitution are also infringed by the said Regulation.

32. In the result, we would issue an order directing the respondents not to take any measure against the petitioner under Regulation 236 of Chapter 22 of the U.P. Police Regulations. The respondents will pay the costs of the petitioner.

ORDER.

33. By the Court: In accordance with the opinion of the majority this writ petition is partly allowed and Regulation 236(b) which authorises "domiciliary visits" is struck down as unconstitutional. The Petitioner would be entitled to the issue of a writ of mandamus directing the respondent not to continue domiciliary visits. The rest of the petition fails and is dismissed. There will be no order as to costs.

¹ 1950 SCR 88

² 94 US 113 at p. 142

³ 338 US 25

⁴ 5 Coke 91 : 1 Sm LC (13th Edn) 104 at p. 105

⁵ (1877) 94 US 113

⁶ (1954) 347 US 497, 499

⁷ [1949] 238 US 25

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(1967) 2 SCR 454: AIR 1967 SC 1170

Appeal from the Judgment and the Order dated 4th December, 1963 of Madhya Pradesh High Court in Letters Patent Appeal No. 28 of 1963

STATE OF MADHYA PRADESH AND ANOTHER . . Appellants;

Versus

THAKUR BHARAT SINGH . . Respondent.

Civil Appeal No. 1066 of 1965, decided on 23rd day of January, 1967.

Present:

THE HON'BLE THE CHIEF JUSTICE K. SUBBA RAO

THE HON'BLE JUSTICE J.C. SHAH

THE HON'BLE JUSTICE J.M. SHELAT

THE HON'BLE JUSTICE V. BHARGAVA

THE HON'BLE JUSTICE G.K. MITTER

For the Appellants: B. Sen, Senior Advocate (I.N. Shroff, Advocate, with him).

The Judgment of the Court was delivered by

SHAH, J.—On April 24, 1963, the State of Madhya Pradesh made an order in exercise of powers conferred by Section 3 of the Madhya Pradesh Public Security Act, 1959 — hereinafter called "the Act" — directing the respondent Thakur Bharat Singh—

"(i) that he shall not be in any place in the Raipur district;

(ii) that he shall reside in the municipal limits of Jhabua town, district Jhabua, Madhya Pradesh, and shall proceed there immediately on the receipt of this order; and

(iii) that he shall notify his movements and report himself personally every day at 8 a.m. and 8 p.m. to the Police Station Officer, Jhabua."

The respondent moved a petition in the High Court of Madhya Pradesh under Articles 226 and 227 of the Constitution challenging the order on the grounds, inter alia, that Sections 3 and 6 and other provisions of the Act which authorised imposition of restrictions on movements and actions of persons were ultra vires in that they infringed the fundamental freedoms guaranteed under Article 19(1)(d) and (e) of the Constitution of India and that the order was "discriminatory, illegal and violated principles of natural justice". Shiv dayal, J., declared clause (i) of the order valid, and declared clauses (ii) and (iii) invalid. In the view of the learned Judge the provisions of Section 3(1)(a) of the Act were valid and therefore the directions contained in clause (i) of the order could lawfully be made by the State, but clauses (b) and (c) of Section 3(1) of the Act were invalid because they contravened the fundamental freedom of movement guaranteed under Article 19 of the Constitution and therefore the directions contained in clauses (ii) and (iii) of the order were invalid. Against the order passed by Shivdayal, J., two appeals were filed under the Letters Patent of the High Court. A Division Bench of the High Court held that

clauses (a) and (c) of Section 3(1) of the Act were valid, but in their view clause (b) of Section 3(1) was not valid because it violated the fundamental guarantee under Article 19(1)(d) of the Constitution. The High Court however confirmed the order of Shivdayal, J., since in their view the direction contained in clause (iii) of the order was "inextricably woven" with the directions in clause (ii) and was on that account invalid. Against the order of the High Court, the State of Madhya Pradesh has appealed to this Court.

2. The relevant provisions of the Act may be briefly set out. Section 3 of the Act provides:

"(1) If the State Government or a District Magistrate is satisfied with respect to any person that he is acting or is likely to act in a manner prejudicial to the security of the State or to the maintenance of public order, and that, in order to prevent him from so acting it is necessary in the interests of the general public to make an order under this section, the State Government or the District Magistrate, as the case may be, may make an order—

(a) directing that, except insofar as he may be permitted by the provisions of the order, or by such authority or persons as may be specified therein, he shall not be in any such area or place in Madhya Pradesh as may be specified in the order;

(b) requiring him to reside or remain in such place or within such area in Madhya Pradesh as maybe specified in the order and if he is not already there to proceed to the place or area within such time as may be specified in the order;

(c) requiring him to notify his movements or to report himself or both to notify his movements and report himself in such manner, at such times and to such authority or person, as may be specified in the order;

(d) imposing upon him such restrictions as may specified in the order, in respect of his association of communication with such persons as may be mentioned in the order;

(e) prohibiting or restricting the possession or use by him of any such article or articles as may be specified in the order.

(2)-(3) * * *

(4) If any person is found in any area or place in contravention of a restriction order or fails to leave any area or place in accordance with the requirements of such an order, then without prejudice to the provisions of sub-section (5), he may be removed from such area or place by any police officer.

(5) If any person contravenes the provisions of any restriction order, he shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to one thousand rupees, or with both."

Section 4 authorises the State to revoke or modify "the restriction order", and Section 5 authorises the State to suspend operation of the "restriction order" unconditionally or upon such conditions as it deems fit and as are accepted by the person against whom the order is made. Section 16 requires the State to disclose the grounds of the "restriction order". Section 8 provides that in every case where a "restriction order" has been made, the State Government shall within thirty days

from the date of the order place before the Advisory Council a copy thereof together with the grounds on which it has been made and such other particulars as have a bearing on the matter and the representation, if any, made by the person affected by such order. Section 9 provides for the procedure of the Advisory Council; and Section 10 requires the State to confirm, modify or cancel the "restriction order" in accordance with the opinion of the Advisory Council.

3. By clause (ii) of the order the respondent was required to reside within the municipal limits of Jhabua town after proceeding to that place on receipt of the order. Under clause (b) of Section 3(1) the State is authorised to order a person to reside in the place where he is ordinarily residing and also to require him to go to any other area or place within the State and stay in that area or place. If the person so ordered fails to carry out the direction, he may be removed to the area or place designated and may also be punished with imprisonment for a term which may extend to one year, or with fine, or with both. The Act it may be noticed does not give any opportunity to the person concerned of being heard before the place where he is to reside or remain in is selected. The place selected may be one in which the person concerned may have no residential accommodation, and no means of subsistence. It may not be possible for the person concerned to honestly secure the means of subsistence in the place selected. Sub-section 3(1)(b) of the Act does not indicate the extent of the place or the area, its distance from the residence of the person concerned and whether it may be habitated or inhabited the clause also nowhere provides that the person directed to be removed shall be provided with any residence, maintenance or means of livelihood in the place selected. In the circumstances we agree with the High Court that clause (b) authorised the imposition of unreasonable restrictions insofar as it required any person to reside or remain in such place or within such area in Madhya Pradesh as may be specified in the order.

4. Counsel for the State did not challenge the view that the restrictions which may be imposed under clause (b) of Section 3(1) requiring a person to leave his hearth, home and place of business and live and remain in another place wholly unfamiliar to him may operate seriously to his prejudice, and may on that account be unreasonable. But he contended that normally in exercise of the power under clause (b) a person would be ordered to remain in the town or village where he resides and there is nothing unreasonable in the order of the State restricting the movements of a person to the town or place where he is ordinarily residing. It is true that under clause (b) an order requiring a person to reside or remain in a place where he is ordinarily residing may be passed. But in exercise of the power it is also open to the State to direct a person to leave the place of his ordinary residence and to go to another place selected by the authorities and to reside and remain in that place. Since the clause is not severable, it must be struck down in its entirety as unreasonable. If it is intended to restrict the movements of a person and to maintain supervision over him, orders may appropriately be made under clauses (c) and (d) of Section 3(1) of the Act.

5. Counsel for the State urged that in any event so long as the State of emergency declared on October 20, 1962, by the President under Article 352 was not withdrawn or revoked, the respondent could not move the High Court by a petition under Article 226 of the Constitution on the plea that by the impugned order his fundamental right guaranteed under Article 19(1)(d) of the Constitution was infringed. But the Act was brought into force before the declaration of the emergency by the President. If

the power conferred by Section 3(1)(b) authorised the imposition of unreasonable restrictions, the clause must be deemed to be void, for Article 13(2) of the Constitution prohibits the State from making any law which takes away or abridges the rights conferred by Part III, and laws made in contravention of Article 13(2) are to the extent of the contravention void. Section 3(1)(b) was therefore void when enacted and was not revived when the proclamation of emergency was made by the President. Article 358 which suspends the provisions of Article 19 during an emergency declared by the President under Article 352 is in terms prospective: after the proclamation of emergency nothing in Article 19 restricts the power of the State to make laws or to take any executive action which the State but for the provisions contained in Part III was competent to make or take. Article 358 however does not operate to validate a legislative provision which was invalid because of the constitutional inhibition before the proclamation of emergency. Counsel for the State while conceding that if Section 3(1)(b) was, because it infringed the fundamental freedom of citizens, void before the proclamation of emergency, and that it was not revived by the proclamation, submitted that Article 358 protects action both legislative and executive taken after proclamation of emergency and therefore any executive action taken by an officer of the State or by the State will not be liable to be challenged on the ground that it infringes the fundamental freedoms under Article 19. In our judgment, this argument involves a grave fallacy. All executive action which operates to the prejudice of any person must have the authority of law to support it, and the terms of Article 358 do not detract from that rule. Article 358 expressly authorises the State to take legislative or executive action provided such action was competent for the State to make or take, but for the provisions contained in Part III of the Constitution. Article 358 does not purport to invest the State with arbitrary authority to take action to the prejudice of citizens and others: it merely provides that so long as the proclamation of emergency subsists laws may be enacted, and executive action may be taken in pursuance of lawful authority, which if the provisions of Article 19 were operative would have been invalid. Our federal structure is founded on certain fundamental principles: (1) the sovereignty of the people with limited Government authority i.e. the Government must be conducted in accordance with the will of the majority of the people. The people govern themselves through their representatives, whereas the official agencies of the executive Government possess only such powers as have been conferred upon them by the people; (2) There is a distribution of powers between the three organs of the State — legislative, executive and judicial — each organ having some check direct or indirect on the other; and (3) the rule of law which includes judicial review of arbitrary executive action. As pointed out by Dicey in his *Introduction to the study of the Law of the Constitution*, 10th Edn., at p. 202, the expression "rule of law" has three meanings, or may be regarded from three different points of view. "It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the Government." At p. 188 Dicey points out:

"In almost every continental community the executive exercises far wider discretionary authority in the matter of arrest, of temporary imprisonment, of expulsion from its territory, and the like, than is either legally claimed or in fact exerted by the Government in England: and a study of European politics now and again reminds English readers that wherever there is discretion there is room for arbitrariness, and that in a republic no less than under a monarchy discretionary authority on the part of the Government must mean insecurity for legal freedom on

the part of its subjects."

We have adopted under our Constitution not the continental system but the British system under which the rule of law prevails. Every Act done by the Government or by its officers must, if it is to operate to the prejudice of any person must, be supported by some legislative authority.

6. Counsel for the State relied upon the terms of Article 162 of the Constitution, and the decision of this Court in *Rai Sahib Ram Jawaya Kapur v. State of Punjab*¹ in support of the contention that it is open to the State to issue executive orders even if there is no legislation in support thereof provided the State could legislate on the subject in respect of which action is taken Article 162 provides that subject to the provisions of the Constitution, the executive power of a State shall extend to the matters with respect to which the Legislature of the State has power to make laws. But Article 162 and Article 73 are concerned primarily with the distribution of executive power between the Union on the one hand and the States on the other, and not with the validity of its exercise. Counsel for the State however strongly relied upon the observations of Mukherjea, C.J., in *Rai Sahib Ram Jawaya Kapur's* case¹:

"They do not mean, ... that it is only when the Parliament or the State Legislature has legislated on certain items appertaining to their respective lists, that the Union or the State executive, as the case may be, can proceed to function in respect to them. On the other hand, the language of Article 162 clearly indicates that the powers of the State executive do extend to matters upon which the State Legislature is competent to legislate and are not confined to matters over which legislation has been passed already."

These observations must be read in the light of the facts of the case. The executive action which was upheld in that case was, it is true, not supported by legislation, but it did not operate to the prejudice of any citizen. In the State of Punjab prior to 1950 the text books used in recognized schools were prepared by private publishers and they were submitted for approval of the Government. In 1950 the State Government published text books in certain subjects, and in other subjects the State Government approved textbooks submitted by publishers and authors. In 1952 a notification was issued by the Government inviting only "authors and others" to submit textbooks for approval by the Government. Under agreements with the authors and others the copyright in the text books vested absolutely in the State and the authors and others received royalty on the sale of those text books. The petitioners — a firm carrying on the business of preparing, printing, publishing and selling text books — then moved this Court under Article 32 of the Constitution praying for writs of mandamus directing the Punjab Government to withdraw the notifications of 1950 and 1952 on the ground that they contravened the fundamental rights of the petitioners guaranteed under the Constitution. It was held by this Court that the action of Government did not amount to infraction of the guarantee under Article 19 (1)(g) of the Constitution, since no fundamental rights of the petitioners were violated by the notifications and the acts of the executive Government done in furtherance of their policy of nationalisation of text books for students. It is true that the dispute arose before the Constitution (Seventh Amendment) Act, 1956, amending inter alia, Article 298 was enacted, and there was no legislation authorising the State Government to enter the field of business of printing, publishing and selling text books. It was contended in support of the petition in *Rai*

*Sahib Ram Jawaya case*¹ that without legislative authority the Government of the State could not enter the business of printing, publishing and selling text books. The Court held that by the action of the Government no rights of the petitioners were infringed, since a mere chance or prospect of having particular customers cannot be said to be a right to property or to any interest or undertaking. It is clear that the State of Punjab had done no act which infringed a right of any citizen: the State had merely entered upon a trading venture. By entering into competition with the citizens, it did not infringe their rights. Viewed in the light of these facts the observations relied upon do not support the contention that the State or its officers may in exercise of executive authority infringe the rights of the citizens merely because the Legislature of the State has the power to legislate in regard to the subject on which the executive order is issued.

7. We are therefore of the view that the order made by the State in exercise of the authority conferred by Section 3(1)(b) of the Madhya Pradesh Public Security Act 25 of 1959 was invalid and for the acts done to the prejudice of the respondent after the declaration of emergency under Article 352 no immunity from the process of the Court could be claimed under Article 358, of the Constitution, since the order was not supported by any valid legislation.

8. The appeal therefore fails and is dismissed.

¹ (1955) 2 SCR 225

(2)SCC]

D. A. V. COLLEGE, BHATINDA v. STATE OF PUNJAB

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1971(2) Supreme Court Cases 261

(Original Jurisdiction)

[BEFORE S. M. SIKRI, C. J., AND G. K. MITTER, K. S. HEODE, A. N. GROVER
AND P. JAGANMOHAN REDDY, JJ.]

D. A. V. COLLEGE, BHATINDA, ETC.

Petitioners:

Versus

THE STATE OF PUNJAB AND OTHERS

Respondents.

Writ Petitions Nos. 353 and 354 of 1970 with C. M. Ps. Nos. 2073
and 2074 of 1971, decided on May 5, 1971

Constitution of India—Articles 29 and 30—Right of linguistic minority to establish and administer educational institutions of their choice—Whether right includes choice of medium of instruction and examination—Whether declaration making Punjabi as the sole medium of instruction and examination justified.

Constitution of India—Schedule VII—Entries 63 and 66 of List I, Entry 11 of List II—Whether medium of instruction an item falling in union list—Whether State Legislature competent to legislate in regard to medium of instruction.

Universities—Punjabi University Act (35 of 1961)—Sections 4(2) and 5—University making Punjabi sole medium of instruction and examination—Whether action justified under Section 4(2).

The petitioners challenged the constitutional validity of Sections 4(2) of Punjabi University Act (35 of 1961), and the notifications and circulars issued thereunder. The petitioners are educational institutions founded by D. A. V. College Trust and Society, which is an association of Arya Samajes. The petitioners have challenged the making of Punjabi the sole medium of instruction and examination for all colleges affiliated under Punjabi University. The grounds of attack by the petitioner are that Section 4(2) of the Act does not confer a power on the University to make Punjabi the sole medium of instruction. The State Legislature has no competence to enact a provision pertaining to medium of instruction because that power is vested in the Parliament. In any case the action offends the right of the petitioner to conserve their script and administer their institutions in their own way.

Held:

- (i) The right of the minorities to establish and administer educational institutions of their choice would include the right to have a choice of the medium of instruction also which would be the result of reading Article 30(1) with Article 29(1). So if the University compulsorily affiliates such colleges and prescribes the medium of instruction and examination to be in a language which is not their mother tongue or requires examination to be taken in a script which is not their own, then it interferes with their fundamental right to conserve their script and administer their institutions. (Para 9)

State of Bombay v. Bombay Education Society and Others, 1955(1) SCR 568 : AIR 1954 SC 561 : 1954 SCJ 678, *relies on*.

- (ii) The State must harmonise its power to prescribe the medium of instruction with the rights of the religious or linguistic minority or any section of the citizens to have the medium of instruction and script of their own choice by either providing also for instruction in the media of these minorities or if there are other Universities which allow such Colleges to be affiliated where the medium of instruction is that which is adopted by the minority institutions, to allow them the choice to be affiliated to them. No State has the legislative competence to prescribe any particular medium of instruction in

respect of higher education or research and scientific or technical instructions, if it interferes with the power of the Parliament under Item 66 of List I to co-ordinate and determine the standard in such institutions.

(Para 11)

Gujarat University, Ahmedabad v. Krishna Ranganath Mudholkar, 1963(1) Supp SCR 112: AIR 1963 SC 703: (1964) 1 SCJ 504; *Chitrallekha v. State of Mysore*, 1964(6) SCR 368: AIR 1964 SC 1823, *relies on*.

(iii) The University by adopting Punjabi as the sole or exclusive medium for the colleges affiliated to University, notwithstanding the concessions granted, acted in excess of the power conferred on it.

(Para 17)

Gujarat University, Ahmedabad v. Krishna Ranganath Mudholkar, 1963(1) Supp SCR 112: AIR 1963 SC 703: (1964) 1 SCJ 504, *followed*.

Petitions allowed.

The Judgment of the Court was delivered by

Reddy, J.—These two writ petitions under Article 32 challenge the vires and constitutionality of Sections 4(2) and 5 of the Punjab University Act 35 of 1961, as amended (hereinafter called "the University" or "the Act", as the case may be). It is also prayed that (i) the notification of the Punjab Government No. 5592-ED-1(PE)/69/12447, dated May 13, 1969, extending the area in which the University shall exercise its powers, and (ii) the circular of the University No. 8617-8661/68/Misc., dated June 15, 1970, as modified by circular No. 9866-9890/DSG, dated July 3, 1970, enclosing the decision of the Senate Sub-committee, dated July 1, 1970, be quashed as being illegal, unconstitutional and void.

2. The petitioners are educational institutions founded by D. A. V. College Trust and Society registered under the Societies Registration Act as an association comprised of Arya Samajis. These Colleges were affiliated to the Punjab University before the reorganisation of the State of Punjab in 1966. The University had been constituted in 1961 by a notification, dated June 30, 1962, it was given jurisdiction over a radius of 10 miles from the office of the University at Patiala which seat had earlier been notified on April 30, 1962 as a Seat of the University. As the writ petitioners were not within the 10 miles radius of the University they continued to be affiliated to the Punjab University. After the reorganisation, the Punjab Government by notification, dated May 13, 1969, issued under sub-section (1) of Section 5 of the Act specified the districts of Patiala, Sangrur, Bhatinda and Rupar as the areas in which the University exercised its power and under sub-section (3) of the said section June 30, 1969, was notified as the date for the purpose of the said section. The effect of this notification was that the petitioners were deemed to be associated with and admitted to the privileges of the University and ceased to be associated in any way with or to be admitted to any privileges of the Punjab University. It may also be mentioned that the Central Government by a notification, dated September 12, 1969, in exercise of the powers conferred on it by Section 72 of the Reorganisation Act directed that the Punjab University constituted under the Punjab University Act, 1947, shall cease to function and operate in the areas of the very four districts regarding which the Punjab Government had earlier issued a notification under Section 5 of the Act.

3. Thereafter the University by the impugned circular, dated June 15, 1970, issued to all the Principals of the Colleges admitted to the privileges of the University, declared that Punjabi "will be the sole medium of instruction and examination for the pre-University even for Science group with effect from the Academic Session 1970-71". Later the University by a letter,

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dated July 2, 1970, informed the Principals that a decision of the Senate Sub-committee, dated July 1, 1970, as enclosed therewith, was made giving "relaxation in some special cases of pre-University students seeking admission for the year 1970". This enclosure was in Punjabi, an English translation of which would show that the relaxation was to permit students who had passed their matriculation examination with English as their medium of examination to be taught and to answer examination papers in the English medium at pre-University level 'only so long as the other Universities and School bodies of Punjab did not adopt Punjabi as their medium of instruction'. On October 7, 1970, the University made a further modification and it was decided by the Senate "that English be allowed as an alternative medium of examination for all students for the courses for which the University had adopted the regional language as the medium. It was however understood that qualifying in the elementary Punjabi paper would, as already decided by the University be obligatory in the case of such students offering English medium as had not studied Punjabi as an elective or optional subject even up to the middle standard". The resolution of July 1, 1970, further decided that students availing themselves of the facilities given thereunder will have to pass a compulsory course in Punjabi of 50 marks of which a minimum of 25 marks will be required to pass that course.

4. It is alleged that as a result of these notifications and resolutions of the University the petitioners Colleges have to teach all subjects including Science subjects in Punjabi and their students have to write examinations in the Gurmukhi script except in the cases exempted in the resolution of the Senate Sub-committee, dated July 1, 1970. It was therefore submitted that the notification, dated June 15, 1970, will result in the lowering of educational standards inasmuch as the students who have passed matriculation examination in Hindi will be handicapped in studying their subjects in Punjabi and writing answers in Gurmukhi script; that the students who have to prepare their subjects and write answers in Punjabi alone in the University examination will be at a disadvantage in seeking admission to professional Colleges such as the Engineering College, Medical College, Business Management College and other Colleges and in the study of Science subjects; and that the students who passed examination through Punjabi medium will be handicapped in the competitive examinations for the I. A. S., in research work and in various other fields. It is further stated that the impugned notification has also resulted in lowering the standard in all respects, as there is (i) no co-ordination for teaching Science subjects and other subjects in higher classes like B. A. and B. Sc., through the medium of Punjabi, and (ii) no corresponding arrangements have been made for answering papers in the examination for admission to the Indian Institute of Technology and All India Institute of Medical Sciences and other competitive examinations for Central services. The main contention of the petitioners however, was that Section 4(2) of the Act does not empower the University to make Punjabi the sole medium of instruction; that it is not within the legislative power of the State under Entry 11 of List II to make Punjabi the sole medium of instruction, which power in fact vested in the Union Parliament under Entry 66, of List I and that consequently the provisions of Section 4(2) and the notification and the circulars referred to above are ultra vires and unconstitutional. In so far as the medium of instruction in Punjabi with Gurmukhi as the script is sought to be imposed on the educational institutions established by the Arya Samajis a religious denomination, they also offend Articles 26(1), 29(1) and 30(1) of the Constitution.

5. A preliminary objection has been urged on behalf of the respondents that in a petition under Article 32, only where it is shown that there is a violation of fundamental right that the validity of the legislation or of the legislative competence can be raised and determined, but in these cases as there is no violation of Articles 14, 26, 29 and 30 of the Constitution the petitioners ought not be allowed to challenge the vires of the Act on the ground of the competence of the Legislature to enact the impugned law. This question has been dealt with fully in the batch of petitions in which we have just pronounced judgment, where we had also considered the contentions of the learned Advocate General of Punjab and Shri Tarkunde, the learned Counsel for Respondent 2 in this behalf and hence we do not propose again to reiterate the reasons in support of the conclusion that a petition under Article 32 in which petitioners make out a *prima facie* case that their fundamental rights are either threatened or violated will be entertained by this Court and that it is not necessary for any person who considers himself to be aggrieved to wait till the actual threat has taken place. On the other objection that the Arya Samaj is neither a linguistic or religious minority nor is it a religious denomination we held that it was unnecessary to go into the question of whether it is a separate religious denomination for the purpose of Article 26(1)(a) or a linguistic minority for the purposes of Article 30(1) because in our view it would be sufficient for the petitioners if they could establish that they had a distinct script of their own and they were a religious minority, to invoke the protection of Articles 29(1) and 30(1). We had in those writ petitions held that what constitutes a linguistic or religious minority must be judged in relation to the State inasmuch as the impugned Act is a State Act and not in relation to the whole of India. In this view we rejected the several contentions which are also urged in these petitions namely that Hindus being a majority in India are not a religious minority in Punjab and held that the Arya Samajis who are part of the Hindu community in Punjab are a religious minority and that they had a distinct script of their own the Devnagri which entitled them to invoke the guarantees under the aforesaid provisions of the Constitution.

6. It may be noticed that the petitioners did not complain at the time when the notification under sub-sections (1) and (3) of Section 5 of the Act was published on the 13th May, 1969, as a result of which their Colleges became affiliated to the University and ceased to be affiliated to the Punjab University. It is only after one academic year had gone by that they filed these petitions in September, 1970. It was earlier pointed out that the Central Government also, had in exercise of the powers under Section 72(1) of the Reorganisation Act, given the necessary directions for the disaffiliation of the Colleges (which included those of the petitioners) in the area notified by the State Government from the Punjab University. No contention can therefore be urged, as was urged in the cases disposed of earlier, that the State Government has no power to issue a notification under sub-sections (1) and (3) of Section 5 of the Act to disaffiliate the petitioners from the Punjab University in the absence of a direction from the Central Government in that behalf, nor can any question arise in this case that the Legislature was not competent to enact Section 5 until other provision was made by the Union Parliament in respect of the functioning and operation of the Punjab University over the areas over which it had prior to the Reorganisation jurisdiction, because the University was constituted prior to the Reorganisation Act by a State Act in which Section 5 had already vested the State Government with powers under sub-sections (1) and (3) of Section 5 of the Act. In view of this position the affiliation of the petitioners with the Punjab University is valid and cannot be challenged.

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7. The main ground of attack by the petitioners is that Section 4(2) of the Act does not confer a power on the University to make Punjabi the sole medium of instruction and if it does, then the State Legislature has no competence to enact such a provision because that power is vested in the Union Parliament under Item 66 of List I. In any case the circular and the notification referred to offend the petitioners right to conserve their script and administer their institutions in their own way.

8. The University does not deny that it had adopted Punjabi language as the sole medium of instruction and for examinations but it seeks to justify it on the ground that it is the national policy of the Government of India that the energetic development of Indian languages and literature is a sine qua non for educational and cultural development. Unless this is done the creative energies of the people will not be released, standards of education will not improve, knowledge will not spread to the people, and the gulf between the intellegentia and the masses will remain, if not widened further. The observations of the Education Commission in its report for 1964-66 as well as from the Report of the Committee of members of of Parliament on education, in 1967 were referred to in support of this policy in furtherance of which the second respondent says that it "adopted a phased programme for switch over from English to Punjabi as sole medium of instruction" for pre-University with effect from academic session 1970-71.

9. It is therefore clear that when the University issued the circular of June 15, 1970, it intended to make Punjabi the exclusive medium of instruction as well as for examination. The use of the word 'sole' in the circular would mean and imply that it is 'exclusive'. In relation to the examination the medium being Punjabi would mean that the script to be used is exclusively Gurmukhi. Now the directive for the exclusive use of the language and script as the medium of instruction and for examination in all Colleges affects the petitioners Colleges which as we said are institutions maintained by a religious minority and directly infringes their right to conserve their script and administer their institutions. The relaxation made subsequently in the earlier directives of the University makes little difference because in order to be allowed to take English as an alternative medium of examination it is obligatory for a student to have passed the matriculation examination with English as the medium of instruction and that unless he has studied Punjabi as an elective or optional subject even up to the middle standard he is required to qualify in the elementary Punjabi paper. This concession however does not benefit students with Hindi as their medium and with Devnagri as their script because for them Punjabi medium is obligatory in the pre-University courses. If as is contended that teaching in the regional language, which means in the mother tongue, accelerates the pace of educational and cultural development and makes for improvement and excellence of educational standards this criteria is equally applicable to the religious or linguistic minorities or to any other section of the citizens who have a distinct language, script and culture and whose right to conserve them, and to administer their institutions are guaranteed under Articles 29(1) and 30(1) of the Constitution. The right of the minorities to establish and administer educational institutions of their choice would include the right to have a choice of the medium of instruction also which would be the result of reading Article 30(1) with Article 29(1). But if the University compulsorily affiliates such Colleges and prescribes the medium of instruction and examination to be in a language which is not their mother tongue or requires examination to be taken in a script which is not their own, then it interferes with their fundamental rights. It is true as is contended by the learned Advocate for the second Respondent,

no linguistic minority can claim that the University shall conduct its examinations in the language or script which the minority institutions have a right to adopt but in such a case it must not force those institutions to compulsorily affiliate themselves and impose on them a medium of instruction and script not their own.

10. This Court had in the *State of Bombay v. Bombay Education Society and Others*.¹ While dealing with a circular issued by the State of Bombay prohibiting the admission to a class where English is used as the medium of instruction, of any pupil who is not an Anglo-Indian and citizens of non-Asiatic descent, held that the State had not the power to prohibit contrary to the rights guaranteed under Article 29(2) the admission of students to Anglo Indian Schools whose mother tongue was not English. Das, J., as he then was delivering the unanimous judgment of the Court observed at page 586 :

"Where however, a minority like the Anglo-Indian Community, which is based, inter alia, on religion and language, has the fundamental right to conserve its language, script and culture under Article 29(1) and has the right to establish and administer educational institutions of their choice under Article 30(1), surely then there must be implicit in such fundamental right the right to impart instruction in their own institutions to the children of their own community in their own language. To hold otherwise will be to deprive Article 29(1) and Article 30(1) of the greater part of their contents."

11. The State must therefore harmonise its power to prescribe the medium of instruction with the rights of the religious or linguistic minority or any section of the citizens to have the medium of instruction and script of their own choice by either providing also for instruction in the media of these minorities or if there are other Universities which allow such Colleges to be affiliated where the medium of instruction is that which is adopted by the minority institutions, to allow them the choice to be affiliated to them. When the country has been reorganised and formed into linguistic States it may be the natural outcome of that policy to allow Colleges established by linguistic and religious minorities giving instructions in the medium of language adopted by the Universities in other States to affiliate to them or if it wants Colleges including the minority institutions to be affiliated to it, to make provision for allowing instruction to be given and examination to be conducted in the media and script of the minorities when it imposes a regional language as the medium of instruction for the University. No inconvenience or difficulties, administrative or financial can justify the infringement of the guaranteed rights. It is also worthy of note that no State has the legislative competence to prescribe any particular medium of instruction in respect of higher education or research and scientific or technical instructions, if it interferes with the power of the Parliament under Item 66 of List I to co-ordinate and determine the standards in such institutions.

12. In the *Gujarat University, Ahmedabad v. Krishna Ranganath Mudholkar*,² the respondent whose medium of instruction in the first year Arts Class in St. Xavier's College affiliated to the Gujarat University, was English was refused admission to Intermediate Arts courses to study for the examination through the English medium in view of the provisions of the

1. 1955(1) SCR 558 : AIR 1954 SC 561 : 1954 SCJ 678.

2. 1963(1) Supp SCR 112 : AIR 1963 SC 703 : (1964)1 SCJ 504.

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University and certain statutes framed by the Senate which were subsequently amended. One of the provisions challenged was Section 4(27), which empowered the University "to promote the development of the study of Gujarati and Hindi in Devnagri script or both as a medium of instruction and examination". Prior to the amendment the proviso permitted that English may continue to be the medium of instruction and examination for a period not exceeding ten years but in 1961, it was amended and certain other periods were fixed and power given to implement the provisions. The details of the amendment are not relevant for our purpose. The High Court of Gujarat issued writs not to enforce the provisions of Section 4(27) and the other provisions which were challenged. In appeal two questions were urged before this Court: (1) whether the University had the power under the Act to prescribe Gujarati or Hindi or both as exclusive medium or media of instruction and examination and (2) whether legislation authorising the University to impose such media was constitutionally valid in view of Entry 66 of List I of the VII Schedule. It was held by the majority, Subba Rao, J., as he then was dissenting, that (1) neither under the Gujarat University Act as originally enacted nor as amended in 1961, was the University empowered to impose Gujarati or Hindi as the exclusive medium of instruction. That this was the intention, was clear because of the use of the indefinite article 'a' immediately preceding the medium of instruction while in the proviso in relation to English being continued the definite article 'the' preceded the medium of instruction to make that the exclusive medium for the periods specified. (2) While Item 11 of List II and Item 66 of List I may overlap recourse must be had to a harmonious construction and where they overlapped, Union legislation must prevail over the State Legislature, and since medium of instruction is not an item in the legislative list it necessarily falls within Item 11 of List II as also within Items 63 to 66 of List I. It was also of the view that in so far as it is a necessary incident of the power under Item 66 it must be deemed to be excluded from Item 11 of List II.

13. In the result disagreeing with the Gujarat High Court that Act 4 of 1961, in so far as it amended the proviso to Section 4(27) is invalid because it was beyond the competence of the State Legislature, the order of the High Court relating to the invalidity of the statutes in so far as they purported to impose Gujarati and Hindi or both as exclusive medium or media of instruction and the circulars enforcing those statutes was confirmed.

14. In *Chitrallekha v. State of Mysore*,³ also it was held that Entries 65 and 66 of List I give the Union power to secure that the standard of research, etc., is not lowered at the hands of any State or States to the detriment of national progress and the power of the State Legislature must be so exercised as not to directly encroach upon the power of the Union under that entry. Subba Rao, J., as he then was speaking for the majority referring to the Gujarat case with reference to a passage extracted from page 139 of the report, observed at page 379:

"This and similar other passages indicate that if the law made by the State by virtue of Entry 11 of List II of the Seventh Schedule to the Constitution makes impossible or difficult the exercise of the legislative power of the Parliament under the entry 'co-ordination and determination of standards in institutions for higher education or research and scientific and technical institutions reserved to the Union, the State law may be bad.'"

3. 1964(6) SCR 368: AIR 1964 SC 1823.

15. No doubt in the judgment of the majority in the Gujarat case there are certain observations which might appear to suggest that the legislative power under Item 66, List I and Item 11, List II may be dependent on certain variable factors which however they said were being made on certain abstract considerations placed before them. That this was so was further emphasised when it was observed at page 143 :

"We have no specific statute the validity of which, apart from the one which we will presently mention, is challenged."

16. In any case the actual decision in the case turned on the interpretation of Section 4(27) of the Gujarat University Act, and as we have earlier noticed it was held disagreeing with the High Court that the University was not vested with the power to prescribe Gujarati or Hindi as the exclusive medium and the provisions which attempted to do so were struck down as invalid. The decision however did not express any opinion on the alleged infringement of the fundamental rights of the petitioners under Articles 29(1) and 30(1) of the Constitution.

17. Applying the decision to facts of this case there is no difficulty in holding that Section 4(3) of the Act which is in similar terms to Section 4(27) of the Gujarat Act, by the use of the indefinite article 'a' prefixed to the word medium, does not require Punjabi to be made the exclusive medium of instruction. This conclusion is further reinforced by the nature of the power which is only "to progressively adopt it as a medium of instruction and examination for as many subjects as possible". The University by adopting Punjabi as the sole or exclusive medium for the Colleges affiliated to the University, notwithstanding the concessions granted, acted in excess of the power conferred on it. While the University can prescribe Punjabi as 'a' medium of instruction it cannot prescribe it as the exclusive medium nor compel affiliated Colleges established and administered by linguistic or religious minorities or by a section of the citizens who wish to conserve their language, script and culture, to teach in Punjabi or take examination in that language with Gurmukhi script. The University Act having compulsorily affiliated these Colleges must of necessity cater to their needs and allow them to administer their institutions in their own way and impart instructions in the medium and write examination in their own script. In this view the petitions are allowed with costs. The impugned circulars of June 15, 1970, as amended by circular of July 2, 1970, in terms of the resolution of the Senate Sub-committee of July 1, 1970, and that of October 7, 1970, are struck down as being invalid and ultra vires of the powers vested in the University. Costs one hearing fee.

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(Before K. K. Mathew, V. R. Krishna Iyer and P. K. Goswami; JJ.)

GOBIND

.. Petitioner;

Versus

STATE OF MADHYA PRADESH AND ANOTHER .. Respondents.

Writ Petition No. 72 of 1970†, decided on March 18, 1975

Constitution of India — Part III — Right of privacy — Whether emanates from the rights guaranteed in Part III and in particular Articles 19(1)(a), (d) and 21 — Right if exists is absolute — Whether violated by Regulations 855 and 856 of M. P. Police Regulations providing for surveillance — Restricted interpretation of the Regulations to save them from unconstitutionality

The petitioner, a citizen of India, alleges that several false cases have been filed against him in criminal courts by the police but that he was acquitted in all but two cases. He says that on the basis that he is a habitual criminal, the police have opened a history sheet against him and that he has been put under surveillance.

The petitioner says that the police are making domiciliary visits both by day and by night at frequent intervals, that they are secretly picketing his house and the approaches to his house, that his movements are being watched by the patel of the village and that when the police come to the village for any purpose, he is called and harassed with the result that his reputation has sunk low in the estimation of his neighbours. The petitioner submits that whenever he leaves the village for another place he has to report to the chowkidar of the village or to the police station about his departure and that he has to give further information about his destination and the period within which he would return. The petitioner contends that these actions of the police are violative of the fundamental right guaranteed to him under Articles 19(1)(d) and 21 of the Constitution, and he prays for a declaration that Regulations 855 and 856 are void as contravening his fundamental rights under the above articles. The case of the respondent State is that the petitioner is a dangerous criminal whose conduct shows that he is determined to lead a criminal life and that he was put under surveillance in order to prevent him from committing offences.

Held:

Privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterisation of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of the present case. (Para 22)

Therefore the Supreme Court refused to consider whether enforcement of morality is a function of State. (Para 22)

Privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values. (Para 23)

†Petition under Article 32 of the Constitution of India.

Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty. (Para 24)

Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. In this sense, many of the fundamental rights of citizens can be described as contributing to the right of privacy. (Para 25)

The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, it cannot be said that the right is absolute. (Para 28)

Minority Judgment in *Kharak Singh v. State of U. P.*, (1964) 1 SCR 332; AIR 1963 SC 1295: (1963) 2 Cri LJ 329, *relied on*.

Murtu v. Illinois, (1877) 94 US 113, 142; *Wolf v. Colorado*, (1949) 338 US 25; *Griswold v. Connecticut*, 381 US 479, 510; *Jones Roe v. Henry Wade*, 410 US 113 and *Olmstead v. U. S.*, 277 US 438, 471, *relied on*.

Drastic inroads directly into the privacy and indirectly into the fundamental rights, of a citizen will be made if Regulations 855 and 856 were to be read widely. To interpret the rule in harmony with the Constitution is therefore necessary and canalisation of the powers vested in the police by the two regulations becomes necessary if they are to be saved at all. (Para 30)

Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. (Para 31)

Regulation 855 empowers surveillance only of persons against whom reasonable materials exist to induce the opinion that they show 'a determination, to lead a life of crime' — crime in this context being confined to such as involve public peace or security only and if they are dangerous security risks. Mere convictions in criminal cases where nothing gravely imperilling the safety of society is involved cannot be regarded as warranting surveillance under this regulation. Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a conviction or release from prison or at the whim of a police officer. (Para 33)

If any action is taken beyond the above boundaries the citizen will be entitled to attack such action as unconstitutional and void. (Para 30)

Constitution of India — Article 21 — Regulations 855 and 856 of the M. P. Police Regulations providing for surveillance — Whether intra vires having force of law — Article 21 if violated

Held:

The impugned regulations were framed by the Government of M.P. under Section 46(2)(c) of the Police Act and are for the purpose of giving effect to its provisions and hence intra vires and have the force of law. Therefore it cannot

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be said that Article 21 is violated. The procedure is reasonable having regard to the provisions of Regulations 853(c) and 857. (Paras 8 to 11 and 31)

Kharak Singh v. State of U. P., (1964) 1 SCR 332; AIR 1963 SC 1295; (1963) 2 Cri LJ 329, distinguished.

Constitutional Interpretation — Of two interpretations the valid one will be preferred

Held:

When there are two interpretations, one wide and unconstitutional, the other narrower but within constitutional bounds, the Supreme Court will read down the overflowing expressions to make them valid. (Para 33)

Petition dismissed

M/2429/CR

Advocates who appeared in this case:

A. K. Gupta and R. A. Gupta, Advocates, for the Petitioner;

Ram Punjwani, H. S. Parihar and I. N. Shroff, Advocates, for the Respondents.

The Judgment of the Court was delivered by

MATHEW, J.—The petitioner is a citizen of India. He challenges the validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations purporting to be made by the Government of Madhya Pradesh under Section 46(2)(c) of the Police Act, 1961.

2. The petitioner alleges that several false cases have been filed against him in criminal courts by the police but that he was acquitted in all but two cases. He says that on the basis that he is a habitual criminal, the police have opened a history sheet against him and that he has been put under surveillance.

3. The petitioner says that the police are making domiciliary visits both by day and by night at frequent intervals, that they are secretly picketing his house and the approaches to his house, that his movements are being watched by the *patel* of the village and that when the police come to the village for any purpose, he is called and harassed with the result that his reputation has sunk low in the estimation of his neighbours. The petitioner submits that whenever he leaves the village for another place he has to report to the chowkidar of the village or to the police station about his departure and that he has to give further information about his destination and the period within which he would return. The petitioner contends that these actions of the police are violative of the fundamental right guaranteed to him under Articles 19(1)(d) and 21 of the Constitution, and he prays for a declaration that Regulations 855 and 856 are void as contravening his fundamental rights under the above Articles.

4. In the return filed, it is stated that the petitioner has managed to commit many crimes during the period 1960 to 1969. In the year 1962 the petitioner was convicted in one case under Section 452 IPC and was fined Rs.100 in default rigorous imprisonment of two months and in another case he was convicted under Section 456 IPC and was fined Rs.50 and in default rigorous imprisonment of one month. In the year 1969 the petitioner was convicted under Section 55/109 Cr. P. C. and was bound over for a period of one year by SDM, Jatara. In the year 1969, the petitioner got compounded a case pending against him under Section 325/147/324 IPC. Similarly, he also got another case under Section 341/324 IPC compounded.

The case of the respondent in short is that the petitioner is a dangerous criminal whose conduct shows that he is determined to lead a criminal life and that he was put under surveillance in order to prevent him from committing offences.

5. Regulation 855 reads :

855. Surveillance proper, as distinct from general supervision, should be restricted to those persons, whether or not previously convicted, whose conduct shows a determination to lead a life of crime. The list of persons under surveillance should include only those persons who are believed to be really dangerous criminals. When the entries in a history sheet, or any other information at his disposal, leads the District Superintendent to believe that a particular individual is leading a life of crime, he may order that his name be entered in the surveillance register. The Circle Inspector will thereupon (open a?) history sheet, if one is not already in existence, and the man will be placed under regular surveillance.

Regulation 856 provides :

856. Surveillance may, for practical purposes, be defined as consisting of the following measures :

- (a) Thorough periodical enquiries by the station-house officer as to repute, habits, association, income, expenses and occupation.
- (b) Domiciliary visits both by day and night at frequent but irregular intervals.
- (c) Secret picketing of the house and approaches on any occasion when the surveillance (surveillant?) is found absent.
- (d) The reporting by patels, mukaddams and kotwars of movements and absences from home.
- (e) The verification of such movements and absences by means of bad character rolls.
- (f) The collection in a history sheet of all information bearing on conduct.

It must be remembered that the surest way of driving a man to a life of crime is to prevent him from earning an honest living. Surveillance should, therefore, never be an impediment to steady employment and should not be made unnecessarily irksome or humiliating. The person under surveillance should, if possible be assisted in finding steady employment, and the practice of warning persons against employing him must be strongly discouraged.

6. In *Kharak Singh v. State of U. P.*¹ this Court had occasion to consider the validity of Regulation 236 of the U. P. Police Regulations which is in *pari materia* with Regulation 856 here. There it was held by a majority that Regulation 236(b) providing for domiciliary visits was unconstitutional for the reason that it abridged the fundamental right of a person under Article 21 and since Regulation-236(b) did not have the force of law, the regulation was declared bad. The other provisions of the regulation were held to be constitutional. The decision that the regulation in question there was not law was based upon a concession made on behalf of the State of U. P. that the U. P. Police Regulations were not framed under any of the provisions of the Police Act.

7. The petitioner submitted that as the regulations in question here were also not framed under any provision of the Police Act, the provisions regarding domiciliary visits in Regulations 855 and 856 must be declared bad and that even if the regulations were framed under Sec-

1. (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cr LJ 329.

tion 46(2)(c) of the Police Act, they offended the fundamental right of the petitioner under Article 19(1)(d) as well as under Article 21 of the Constitution.

8. So far as the first contention is concerned, we are of the view that the regulations were framed by the Government of Madhya Pradesh under Section 46(2)(c) of the Police Act. Section 46(2) states that the State Government may, from time to time, by notification in the official gazette, make rules consistent with the Act—

(c) generally, for giving effect to the provisions of this Act.

9. The petitioner contended that rules can be framed by the State Government under Section 46(2)(c) only for giving effect to the provisions of the Act and that the provisions in Regulation 856 for domiciliary visits and other matters are not for the purpose of giving effect to any of the provisions of the Police Act and therefore Regulation 856 is ultra vires.

10. We do not think that the contention is right. There can be no doubt that one of the objects of the Police Act is to prevent commission of offences. The preamble to the Act states :

Whereas it is expedient to re-organise the police and to make it a more efficient instrument for the prevention and detection of crime.

And, Section 23 of the Act (so far as it is material) reads :

It shall be the duty of every police officer . . . to prevent the commission of offences and public nuisances. . . .

11. We think that the provision in Regulation 856 for domiciliary visits and other actions by the police is intended to prevent the commission of offences. The object of domiciliary visits is to see that the person subjected to surveillance is in his home and has not gone out of it for commission of any offence. We are therefore of opinion that Regulations 855 and 856 have the force of law.

12. The next question is whether the provisions of Regulation 856 offend any of the fundamental rights of the petitioner.

13. In *Kharak Singh v. State of U. P.* (supra) the majority said that 'personal liberty' in Article 21 is comprehensive to include all varieties of rights which go to make up the personal liberty of a man other than those dealt with in Article 19(1)(d). According to the Court, while Article 19(1)(d) deals with the particular types of personal freedom, Article 21 takes in and deals with the residue. The Court said :

We have already extracted a passage from the judgment of Field, J. in *Munn v. Illinois* where the learned Judge pointed out that 'life' in the 5th and 14th Amendments of the U. S. Constitution corresponding to Article 21 means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs — his arms and legs etc. We do not entertain any doubt that the word 'life' in Article 21 bears the same signification. Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an

intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to "assure the dignity of the individual" and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any pre-conceived notions or doctrinaire constitutional theories.

The Court then quoted a passage from the judgment of Frankfurter, J. in *Wolf v. Colorado*¹ to the effect that the security of one's privacy against arbitrary intrusion by the police is basic to a free society and that the knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples. The Court then said that at Common Law every man's house is his castle and that embodies an abiding principle transcending mere protection of property rights and expounds a concept of 'personal liberty' which does not rest upon any element of feudalism or any theory of freedom which has ceased to exist. The Court ultimately came to the conclusion that Regulation 236(b) which authorised domiciliary visits was violative of Article 21 and "as there is no 'law' on the basis of which the same could be justified, it must be struck down as unconstitutional". The Court was of the view that the other provisions in Regulation 236 were not bad as no right of privacy has been guaranteed by the Constitution.

14. Subba Rao, J. writing for the minority, was of the opinion that the word 'liberty' in Article 21 was comprehensive enough to include privacy also. He said that although it is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the right is an essential ingredient of personal liberty, that in the last resort, a person's house, where he lives with his family, is his 'castle', that nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy and that all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution. And, as regards Article 19(1)(d), he was of the view that that right also was violated. He said that the right under that sub-Article is not mere freedom to move without physical obstruction and observed that movement under the scrutinizing gaze of the policeman cannot be free movement, that the freedom of movement in clause (a) therefore must be a movement in a free country, i.e., in a country where he can do whatever he likes, speak to whomsoever he wants, meet people of his own choice without any apprehension, subject of course to the law of social control and that a person under the shadow of surveillance is certainly deprived of this freedom. He concluded by saying

3. (1949) 338 US 25.

that surveillance by domiciliary visits and other acts is an abridgment of the fundamental right guaranteed under Article 19(1)(d) and under Article 19(1)(a). He however did not specifically consider whether Regulation 236 could be justified as a reasonable restriction in public interest falling within Article 19(5).

15. It was submitted on behalf of the petitioner that right to privacy is itself a fundamental right and that that right is violated as Regulation 856 provides for domiciliary visits and other incursions into it. The question whether right to privacy is itself a fundamental right flowing from the other fundamental rights guaranteed to a citizen under Part III is not easy of solution.

16. In *Griswold v. Connecticut*⁴, a Connecticut statute made the use of contraceptives a criminal offence. The executive and medical directors of the Planned Parenthood League of Connecticut were convicted in the Circuit Court on a charge of having violated the statute as accessories by giving information, instruction and advice to married persons as to the means of preventing conception. The Appellate Division of the Circuit Court affirmed and its judgment was affirmed by the Supreme Court of Errors of Connecticut. On appeal, the Supreme Court of the United States reversed. In an opinion by Douglas, J., expressing the view of five members of the Court, it was held that the statute was invalid as an unconstitutional invasion of the right of privacy of married persons. He said that the right of freedom of speech and press includes not only the right to utter or to print, but also the right to distribute, the right to receive, the right to read and that without those peripheral rights the specific rights would be less secure and that likewise, the other specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance, that the various guarantees create zones of privacy, and that protection against all governmental invasion "of the sanctity of a man's home and the privacies of life" was fundamental. He further said that the inquiry is whether a right involved

is of such a character that it cannot be denied without violating those 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions' and that 'privacy is a fundamental personal right, emanating from the totality of the constitutional scheme under which we (Americans) live'.

17. In his dissenting opinion, Mr. Justice Black berated the majority for discovering and applying a constitutional right to privacy. His reading of the Constitution failed to uncover any provision or provisions forbidding the passage of any law that might abridge the 'privacy' of individuals.

18. In *Jane Roe v. Henry Wade*⁵, an unmarried pregnant woman who wished to terminate her pregnancy by abortion instituted an action in the United States District Court for the Northern District of Texas, seeking a declaratory judgment that the Texas criminal abortion statutes, which prohibited abortions except with respect to those procured or attempted by medical advice for the purpose of saving the life of the mother, were unconstitutional. The Supreme Court said that although

4. 381 US 479, 510.

5. 410 US 113.

the Constitution of the U.S.A. does not explicitly mention any right of privacy, the United States Supreme Court recognizes that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution, and

that the roots of that right may be found in the First Amendment, in the Fourth and Fifth Amendments, in the penumbras of the Bill of Rights, in the Ninth Amendment, and in the concept of liberty guaranteed by the first section of the Fourteenth Amendment

and that the "right to privacy is not absolute".

19. The usual starting point in any discussion of the growth of legal concept of privacy, though not necessarily the correct one, is the famous article, "*The Right to Privacy*" by Charles Warren and Louis D. Brandeis⁶. What was truly creative in the article was their insistence that privacy, — the right to be let alone — was an interest that man should be able to assert directly and not derivatively from his efforts to protect other interests. To protect man's "inviolable personality" against the intrusive behaviour so increasingly evident in their time, Warren and Brandeis thought that the law should provide both a criminal and a private law remedy :

Once a civilization has made a distinction between the 'outer' and the 'inner' man, between the life of the soul and the life of the body, between the spiritual and the material, between the sacred and the profane, between the realm of God and the realm of Caesar, between Church and State, between rights inherent and inalienable and rights that are in the power of government to give and take away, between public and private, between society and solitude, it becomes impossible to avoid the idea of privacy by whatever name it may be called — the idea of 'private space' in which man may become and remain 'himself'.⁷

20. There can be no doubt that the makers of our Constitution wanted to ensure conditions favourable to the pursuit of happiness. They certainly realized as Brandeis, J. said in his dissent in *Olmstead v. United States*⁸, the significance of man's spiritual nature, of his feelings and of his intellect and that only a part of the pain, pleasure, satisfaction of life can be found in material things and therefore they must be deemed to have conferred upon the individual as against the government a sphere where he should be let alone.

21. "The liberal individualist tradition has stressed, in particular, three personal ideals, to each of which corresponds a range of 'private affairs'. The first is the ideal of personal relations ; the second, the Lockean ideal of the politically free man in a minimally regulated society ; the third, the Kantian ideal of the morally autonomous man, acting on principles that he accepts as rational."⁹

22. There can be no doubt that privacy-dignity claims deserve to be examined with care and to be denied only when an important counter-vailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right,

6. See 4 HLR 193.

7. See "*Privacy and the Law: A Philosophical Prelude*" by Milton R. Konvitz in 31 Law and Contemporary Problems (1966), pp. 272, 273.

8. 277 US 438, 471.

9. See Benn, "*Privacy, Freedom and Respect for Persons*" in J. Pennock & J. Chapman, Eds., *Privacy*, Nomos XIII, 1, 15-16.

a law infringing it must satisfy the compelling State interest test. Then the question would be whether a State interest is of such paramount importance as would justify an infringement of the right. Obviously, if the enforcement of morality were held to be a compelling as well as a permissible State interest, the characterization of a claimed right as a fundamental privacy right would be of far less significance. The question whether enforcement of morality is a State interest sufficient to justify the infringement of a fundamental privacy right need not be considered for the purpose of this case and therefore we refuse to enter the controversial thicket whether enforcement of morality is a function of State.

23. Individual autonomy, perhaps the central concern of any system of limited government, is protected in part under our Constitution by explicit constitutional guarantees. In the application of the Constitution our contemplation cannot only be of what has been but what may be. Time works changes and brings into existence new conditions. Subtler and far reaching means of invading privacy will make it possible to be heard in the street what is whispered in the closet. Yet, too broad a definition of privacy raises serious questions about the propriety of judicial reliance on a right that is not explicit in the Constitution. Of course, privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

24. Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

25. Rights and freedoms of citizens are set forth in the Constitution in order to guarantee that the individual, his personality and those things stamped with his personality shall be free from official interference except where a reasonable basis for intrusion exists. "Liberty against government" a phrase coined by Professor Corwin expresses this idea forcefully. In this sense, many of the fundamental rights of citizens can be described as contributing to the right to privacy.

26. As Ely says :

There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case.¹⁰

27. There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals

10. See *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale LJ 920, 932.

might be engaging in such activities and that such 'harm' is not constitutionally protectible by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted as themselves, an image that may reflect the values of their peers rather than the realities of their natures.¹¹

28. The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

29. The European Convention on Human Rights, which came into force on September 3, 1953, represents a valiant attempt to tackle the new problem. Article 8 of the Convention is worth citing¹²:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others.

30. Having reached this conclusion, we are satisfied that drastic inroads directly into the privacy and indirectly into the fundamental rights, of a citizen will be made if Regulations 855 and 856 were to be read widely. To interpret the rule in harmony with the Constitution is therefore necessary and canalisation of the powers vested in the police by the two regulations earlier read becomes necessary, if they are to be saved at all. Our founding fathers were thoroughly opposed to a Police Raj even as our history of the struggle for freedom has borne eloquent testimony to it. The relevant Articles of the Constitution we have adverted to earlier, behove us therefore to narrow down the scope for play of the two regulations. We proceed to give direction and restriction to the application of the said regulations with the caveat that if any action were taken beyond the boundaries so set, the citizen will be entitled to attack such action as unconstitutional and void.

31. Depending on the character and antecedents of the person subjected to surveillance as also the objects and the limitation under which surveillance is made, it cannot be said surveillance by domiciliary visits would always be unreasonable restriction upon the right of privacy. Assuming that the fundamental rights explicitly guaranteed to a citizen have penumbral zones and that the right to privacy is itself a fundamental right, that fundamental right must be subject to restriction on the basis of compelling public interest. As Regulation 856 has the force of law,

11. See 26 Stanford Law Rev. 1161, 1187.

12. See "Privacy and Human Rights", Ed. AH Robertson, p. 176.

it cannot be said that the fundamental right of the petitioner under Article 21 has been violated by the provisions contained in it: for, what is guaranteed under that Article is that no person shall be deprived of his life or personal liberty except by the procedure established by 'law'. We think that the procedure is reasonable having regard to the provisions of Regulations 853(c) and 857. Even if we hold that Article 19(1)(d) guarantees to a citizen a right to a privacy in his movement as an emanation from that Article and is itself a fundamental right, the question will arise whether Regulation 856 is a law imposing reasonable restriction in public interest on the freedom of movement falling within Article 19(5); or, even if it be assumed that Article 19(5) does not apply in terms, as the right to privacy of movement cannot be absolute, a law imposing reasonable restriction upon it for compelling interest of State must be upheld as valid.

32. Under clause (c) of Regulation 853, it is only persons who are suspected to be habitual criminals who will be subjected to domiciliary visits. Regulation 857 provides as follows:

A comparatively short period of surveillance, if effectively maintained, should suffice either to show that the suspicion of criminal livelihood was unfounded, or to furnish evidence justifying a criminal prosecution, or action under the security sections. District Superintendents and their assistants should go carefully through the histories of persons under surveillance during their inspections, and remove from the register the names of such as appear to be earning an honest livelihood. Their histories will thereupon be closed and surveillance discontinued. In the case of a person under surveillance who has been lost sight of and is still untraced, the name will continue on the register for as long as the District Superintendent considers necessary.

Surveillance is also confined to the limited class of citizens who are determined to lead a criminal life or whose antecedents would reasonably lead to the conclusion that they will lead such a life.

33. When there are two interpretations, one wide and unconstitutional, the other narrower but within constitutional bounds, this Court will read down the overflowing expressions to make them valid. So read, the two regulations are more restricted than Counsel for the petitioner sought to impress upon us. Regulation 855, in our view, empowers surveillance only of persons against whom reasonable materials exist to induce the opinion that they show 'a determination, to lead a life of crime' — crime in this context being confined to such as involve public peace or security only and if they are dangerous security risks. Mere convictions in criminal cases where nothing gravely imperilling safety of society cannot be regarded as warranting surveillance under this regulation. Similarly, domiciliary visits and picketing by the police should be reduced to the clearest cases of danger to community security and not routine follow-up at the end of a conviction or release from prison or at the whim of a police officer. In truth, legality apart, these regulations ill accord with the essence of personal freedoms and the State will do well to revise these old police regulations verging perilously near unconstitutionality.

34. With these hopeful observations, we dismiss the writ petition.

OLGA TELLIS v. BOMBAY MUNICIPAL CORPORATION

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(BEFORE Y.V. CHANDRACHUD, C.J. AND S. MURTAZA FAZAL ALI,
 V.D. TULZAPURKAR, O. CHINNAPPA REDDY
 AND A. VARADARAJAN, JJ.)

Writ Petitions Nos. 4610-4612 of 1981

OLGA TELLIS AND OTHERS .. Petitioners ;

Versus

BOMBAY MUNICIPAL CORPORATION
 AND OTHERS .. Respondents.

And

Writ Petitions Nos. 5068-5079 of 1981

VAYYAPURI KUPPUSAMI AND OTHERS .. Petitioners ;

Versus

STATE OF MAHARASHTRA AND OTHERS .. Respondents.

Writ Petitions Nos. 4610-4612 and 5068-5079 of 1981†,
 decided on July 10, 1985

Constitution of India — Articles 19(1)(e) and (g), 21, 37, 39(a), 41 and 32 — Pavement and slum dwellers — Their forcible eviction and removal of their hutments under Bombay Municipal Corporation Act, 1888 — Articles 19(1)(e) and 21 if violated — Maintainability of writ petitions under Article 32 — Reasonableness of procedure prescribed under Section 314 of the Bombay Act — Compliance with audi alteram partem rule before causing any encroachment to be removed — Government's obligation to act upon its assurances regarding providing alternative accommodations to evicted persons

The petitioners are the pavement and basti or slum dwellers of Bombay city. They are amongst almost half of the population of the city who live on footpaths and in slums for their survival. Living on a pavement or a slum in the vicinity of their place of work saves them time and cost. The petitions in the nature of Public Interest Litigation are in writ petitions 4610-4612 of 1981 by a journalist and two pavement dwellers while the group of writ petitions 5068-79 of 1981 are by residents of Kanraj Nagar, a basti or habitation which is alleged to have come into existence in about 1960-61 near the Western Express Highway, Bombay and by persons residing in structures constructed off the Tulsi Pipe Road, Mahim, Bombay. The Peoples' Union for Civil Liberties, the Committee for the Protection of Democratic Rights and a journalist have joined these petitions. The petitioners challenge under Article 32 the decision of the respondents regarding their forcible eviction and demolition of their pavement and slum dwellings, under Section 314 of the Bombay Municipal Corporation Act on ground of violation of their rights under Articles 19 and 21. They seek a declaration that Sections 312, 313 and 314 of the Bombay Municipal Corporation Act are invalid as violating Articles 14, 19 and 21 and that the respondents should be directed to withdraw their decision to demolish the pavement dwellings and the slum hutments and, where they were

†Under Article 32 of the Constitution of India

already demolished, to restore possession of the sites to the former occupants.
Disposing of the petitions Supreme Court

Held:

The writ petitions are maintainable under Article 32. Eviction of the petitioners from their dwellings would result in deprivation of their livelihood. Article 21 includes livelihood and so if deprivation of livelihood is not effected by a reasonable procedure established by law, the same would be violative of Article 21. However, the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passage or access is not unreasonable in the circumstances of the case. No person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or earmarked for a public purpose like, for example, a garden or a playground. The Commissioner has a discretion under Section 314(a) to issue notice or not before taking steps for removal of encroachments, which he is required to exercise reasonably. The Kamraj Nagar is situated on a part of the road leading to the Western Express Highway and as such serious traffic hazards arise on account of the straying of the Basti children on to the Express Highway, on which there is heavy vehicular traffic. The same criterion would apply to the Kamraj Nagar Basti as would apply to the dwellings constructed unauthorisedly on other roads and pavements in the city. (Paras 31, 37, 42 and 45)

However despite holding Section 314 valid, in terms of the assurances given by the State Government in its pleadings before the Court, it is directed that the pavement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate pitches at Malvani or, at such other convenient place as the Government considers reasonable but not farther away in terms of distance; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their resettlement before eviction; slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purpose, in which case, alternate sites or accommodation will be provided to them; the 'Low Income Scheme Shelter Programme' which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly; and, the 'Slum Upgradation Programme (SUP)' under which basic amenities are to be given to slum dwellers will be implemented without delay. Highest priority must be given by the State Government to the resettlement of these unfortunate persons. In order to minimise the hardship involved in any eviction, it is directed that the slums, wherever situated, will not be removed until one month after the end of the current monsoon season, that is, until October 31, 1985 and, thereafter, only in accordance with the present judgment. If any slum is required to be removed before that date, parties may apply to the Supreme Court. Pavement dwellers, whether censused or uncensused, will not be removed until the same date, namely, October 31, 1985. (Paras 51 to 57)

I. MAINTAINABILITY OF WRIT PETITION UNDER ARTICLE 32

A. Constitution of India — Article 32 — Estoppel — No estoppel can be claimed against enforcement of fundamental rights under — Even if petitioners conceded before High Court that they would not claim any fundamental rights

in case of their eviction from their pavement or slum dwellings, they would not be estopped from claiming the same before Supreme Court in writ petition.

B. Constitution of India — Articles 32 and 21 — Writ petition before Supreme Court when maintainable — Petition against procedurally ultra vires Government action — Writ petition under Article 32 by pavement and slum dwellers challenging procedure prescribed under Section 314 of Bombay Municipal Corporation Act, 1888 for removal of their hutments on ground of violation of Article 21, held, maintainable

C. Estoppel — Principle behind — Estoppel and waiver — No estoppel against enforcement of fundamental rights — Evidence Act, 1872, Section 115

A writ petition was filed on the Original Side of the Bombay High Court by and on behalf of the pavement dwellers claiming reliefs similar to those claimed in the instant batch of writ petitions. The pavement dwellers had conceded in the High Court that they did not claim any fundamental right to put up huts on pavements or public roads and that they will not obstruct the demolition of the huts after October 15, 1981. In the present writ petitions under Article 32, the contention of the petitioners is that the procedure prescribed by Section 314 of the B.M.C. Act being arbitrary and unfair, it was not 'procedure established by law' within the meaning of Article 21 and, therefore, they could not be deprived of their fundamental right to life by resorting to that procedure. The respondents objected to the maintainability of the petitions. A preliminary objection was raised on behalf of the Bombay Municipal Corporation that in view of what was conceded by the petitioner pavement dwellers before the High Court, they were estopped from contending in the present petitions before Supreme Court that the huts constructed by them on the pavements could not be demolished because of their right to livelihood.

Held :

The petitions are clearly maintainable under Article 32. (Para 31)

C. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. (Paras 28 and 29)

A.&C. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the

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part of public authorities will be in violation of their fundamental rights.

(Para 28)

Basheshar Nath v. CIT, 1959 Supp 1 SCR 528 : AIR 1959 SC 149 : (1959)
35 JTR 190. relied on

B. The question of enforcement of fundamental rights would arise where action is taken under a statute which is ultra vires the Constitution or the action itself is without jurisdiction though taken under an intra vires statute or the action is procedurally ultra vires or where an authority under an obligation to act judicially passes an order in violation of the principles of natural justice. These categories are however, not exhaustive. Having regard to the contention of the petitioners in the present case it is clear that the petitions under Article 32 are maintainable (Para 31)

Ujjam Bai v. State of U.P., (1963) 1 SCR 778 : AIR 1962 SC 1621 and
Naresh Shridhar Mirajkar v. State of Maharashtra, (1966) 3 SCR 744,
770 : AIR 1967 SC 1. relied on

II. CONSTITUTION OF INDIA — ARTICLE 21 — RIGHT TO LIVELIHOOD

D. Constitution of India — Articles 21, 37, 39(a) and 41 — 'Life' — Right to life, held, includes right to the means of livelihood which make it possible for a person to live

E. Constitution of India — Article 32 — Pleading and proof — Eviction of pavement and slum dwellers of Bombay city — Whether would result in deprivation of their means of livelihood — Proof of — Individual cases of deprivation need not be shown — Inference can be drawn from empirical data and by applying common sense — Held, on facts, right to livelihood would be deprived if eviction is resorted to — Evidence Act, 1872, Section 3 — Statistical data, reliance on for proof — Court can decide on basis of common sense itself — Brandies brief

F. Constitution of India — Articles 39(a), 41 and 37 — Must be regarded equally fundamental in interpreting and understanding the meaning and content of fundamental rights — Parts III and IV of the Constitution — Relationship between

G. Practice and Procedure — Issues of general public importance — Proof regarding — Constitution of India, Article 32

The contention of the petitioners is that the right to life guaranteed by Article 21 includes the right to livelihood and since, they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction would be tantamount to deprivation of their life and hence unconstitutional.

Held :

D. The sweep of the right to life, conferred by Article 21 is wide and far reaching. 'Life' means something more than mere animal existence. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of

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livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. There is thus a close nexus between life and the means of livelihood and as such that, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. (Para 32)

Baksey v. Board of Regents, 347 MD 442 (1954); Munn v. Illinois, (1877) 94 US 113 and Kharak Singh v. State of U.P., (1964) 1 SCR 332: AIR 1963 SC 1295; (1963) 2 Cri LJ 329, relied on

D.&F. The principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But any person, who is deprived of his right to livelihood, except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21. (Para 33)

In Re Sant Ram, (1960) 3 SCR 499: AIR 1960 SC 932: (1961) 1 SCJ 98, distinguished

E.&G. That the eviction of a person from a pavement or slum will inevitably lead to the deprivation of his means of livelihood, is a proposition which does not have to be established in each individual case. That is an inference which can be drawn from acceptable data. Issues of general public importance, which affect the lives of large sections of the society, defy a just determination if their consideration is limited to the evidence pertaining to specific individuals. In the resolution of such issues, there are no symbolic samples which can effectively project a true picture of the grim realities of life. The present writ petitions, though involve a question relating to dwelling houses, cannot be equated with a suit for possession of a house by one private person against another. In a matter like the present one in which the future of half of the city's population is at stake, the Court must consult authentic empirical data compiled by agencies, official and non-official. It is by that process that the core of the problem can be reached and a satisfactory solution found. It would be unrealistic to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements. The matter has to be looked at by using common sense. (Para 35)

E. In the present case the facts constituting empirical evidence justify the conclusion that persons in the position of petitioners live in slums and on pavements because they have small jobs to nurse in the city and for them there is nowhere else to live. They choose a pavement or a slum in the vicinity of their place of work and to lose the pavement or the slum is to lose the job. The conclusion, therefore, in terms of the constitutional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life. (Para 36)

But the Constitution does not put an absolute embargo on the deprivation of life or personal liberty. Only it must be according to procedure established

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by law. Therefore the B.M.C. Act which allows the deprivation must satisfy Article 21. (Para 37)

The Report of the Expert Group of Programmes for the Alleviation of Poverty, (1982); Budget and the New 20 Point Socio-Economic Programme, relied on

Note: See Editor's note on this point at the end of the headnote.

III. CONSTITUTION OF INDIA — ARTICLE 21 — REASONABLENESS OF PROCEDURE FOR DEPRIVATION OF LIVELIHOOD —
BOMBAY MUNICIPAL CORPORATION ACT, 1888,
SECTION 314, — OBSERVANCE OF
NATURAL JUSTICE

H. Constitution of India — Article 21 — 'Procedure established by law' — Must be reasonable, just and fair — Authority exercising statutory power must act reasonably, otherwise the procedure prescribed by the statute itself would be deemed to be unreasonable — Procedure prescribed under Section 314 of Bombay Municipal Corporation Act, 1888 held, reasonable — Hence eviction of pavement and slum dwellers of Bombay city under Section 314 not violative of Article 21 on ground of procedural unreasonableness

I. Constitution of India — Article 21 — Pavement and slum dwellers — Encroachments on public places by erecting structures or hutments on pavements and in places near highways cannot be claimed by way of right howsoever compelling the necessity may be — Bombay Municipal Corporation Act, 1888 — Sections 61, 63, 312, 313 and 314

J. Constitution of India — Articles 19 and 21 — Rights of pavement and slum dwellers vis-a-vis those of pedestrians

K. Constitution of India — Article 19(6) — Reasonableness — To be determined in the facts and circumstance of the case

L. Municipalities — Bombay Municipal Corporation Act, 1888 — Section 314 — Power to remove encroachments 'without notice' — Held, not unreasonable in the context — Discretion conferred on the Commissioner to serve or not to serve notice must be exercised reasonably — Notice cannot be shelved on mere ground that notice would be futile as the encroachers had no explanations to offer or that the encroachers are criminal trespassers — On facts held, Commissioner justified in removing the encroachments though he should have served notice on the aggrieved persons

M. Administrative Law — Natural justice — Audi alteram partem — Notice — Discretion conferred on statutory authority to act with or without notice — Must be exercised reasonably, fairly and justly — Action without notice not justified on mere ground that the affected party would have no explanation even if hearing afforded by serving notice — Intrinsic and instrumental facets of right to hearing stated

N. Administrative Law — Natural justice — Exclusion of — When permissible

O. Administrative Law — Natural justice — Hearing — Post-decisional hearing — Hearing before an adjudicatory body — Remand when not necessary — Although no hearing afforded by the statutory authority, aggrieved party getting

sufficient opportunity of hearing before court — In the circumstances the authority need not be directed to afford hearing to the party again — Practice

P. Penal Code, 1860 — Section 441 — Criminal trespass — Encroachment on public properties by raising hutments on pavements and in slum areas by poor people — Held, on facts, does not amount to criminal trespass

Q. Torts — Trespass — Encroachment on public properties by pavement and slum dwellers out of compelling necessity — Forcible eviction of — Extent of force required — Necessity to cause such encroachment as a plausible defence

R. Interpretation of Statutes — Interpretation which would sustain validity of a provision should be preferred

Sections 312 to 314 of the Bombay Municipal Corporation Act empower the Municipal Commissioner to cause to be removed encroachments on foot-paths or pavements over which the public have a right of passage or access. In these cases, wherever constructions have been put up on the pavements, the public have a right of passage or access over those pavements. The argument of the petitioners is that the procedure prescribed by Section 314 for the removal of encroachments from pavements is arbitrary and unreasonable since, not only does it not provide for the giving of a notice before the removal of an encroachment but, it provides expressly that the Municipal Commissioner may cause the encroachment to be removed 'without notice'.

Held :

H. Unreasonableness vitiates law and procedure alike. Hence the procedure prescribed by law for depriving a person of his right to life must conform to the norms of justice and fairplay. Procedure, which is unjust or unfair attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. (Para 40)

E.P. Royappa v. State of T.N., (1974) 4 SCC 3 : 1974 SCC (L&S) 165 : (1974) 2 SCR 348 ; Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : (1978) 2 SCR 621 ; M.H. Hoscot v. State of Maharashtra, (1978) 3 SCC 544 : 1978 SCC (Cri) 468 : (1979) 1 SCR 192 ; Sunil Batra (I) v. Delhi Administration, (1978) 4 SCC 494 : 1979 SCC (Cri) 155 : (1979) 1 SCR 392 ; Sita Ram v. State of U.P., (1979) 2 SCC 656 : 1979 SCC (Cri) 576 : (1979) 2 SCR 1085 ; Hussainara Khatoon (IV) v. Home Secretary, State of Bihar, (1980) 1 SCC 98 : 1980 SCC (Cri) 40 : (1979) 3 SCR 532 ; Hussainara Khatoon (II) v. Home Secretary, State of Bihar, (1980) 1 SCC 81 : 1980 SCC (Cri) 23 ; Sunil Batra (II) v. Delhi Administration, (1980) 3 SCC 488 : 1980 SCC (Cri) 777 : (1980) 2 SCR 557 ; Jolly George Varghese v. Bank of Cochin, (1980) 2 SCC 360 : (1980) 2 SCR 913 : AIR 1980 SC 470 ; Kasturi Lal Lakshmi Reddy v. State of J & K, (1980) 4 SCC 1 : (1980) 3 SCR 1338 ; Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608 : 1981 SCC (Cri) 212 :

(1981) 2 SCR 516 and *Ramana Dayaram Shetty v. International Airport Authority of India*, (1979) 3 SCC 489 : (1979) 3 SCR 1014 ; *Viteralli v. Seton*, 3 L Ed 2d 1012, relied on

The Influence of Remedies on Rights (Current Legal Problems, 1953, Vol. (6) ; K.K. Mathew, "The Welfare State, Rule of Law and Natural Justice" in his book *Democracy, Equality and Freedom*, relied on

K. There is no static measure of reasonableness which can be applied to all situations alike. The question 'Is this procedure reasonable?' implies and postulates the inquiry as to whether the procedure prescribed is reasonable in the circumstances of the case. (Para 42)

Francis Coralie Mullin v. Administrator, Union Territory of Delhi, (1981) 1 SCC 608 : 1981 SCC (Cri) 212 : (1981) 2 SCR 516, relied on

I.&J. It is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon. Public streets, of which pavements form a part, are public properties intended to serve convenient passage and to ensure a reasonable measure of safety and security to the general public. That facility, which has matured into a right of the pedestrians, cannot be set at naught by allowing encroachments to be made on the pavements. Even the pedestrians have but the limited right of using pavements for the purpose of passing and repassing. So long as a person does not transgress the limited purpose for which pavements are made, his use thereof is legitimate and lawful. But, if a person puts any public property to a use for which it is not intended and is not authorised so to use it, he becomes a trespasser. There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up constructions on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that, the former should be preferred to the latter. Pedestrians deserve consideration in the matter of their physical safety, which cannot be sacrificed in order to accommodate persons who use public properties for a private purpose, unauthorizedly. The existence of dwellings on the pavements is an act of trespass and a source of nuisance to the public, at least for the reason that they are denied the use of pavements for passing and repassing. Such encroachments promote public nuisance, constitute grave traffic hazards and jeopardise public safety, health and convenience. (Para 43)

Hickman v. Maisey, (1900) 1 QB 752 and *Kadish* : "Methodology and Criteria in Due Process Adjudication — A Survey and Criticism", 66 Yale LJ 319, 340 (1957), relied on

L.&R. Section 314 of the B.M.C. Act is in the nature of an enabling provision and not of a compulsive character. It confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. This interpretation is preferable because it helps sustain the validity of the law. It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule could be presumed to have been intended. (Paras 44 and 45)

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N. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence. (Para 45)

M. The decision to dispense with notice cannot be founded upon a presumed impregnability of the proposed action. The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well-recognised understanding of the real import of the rule of hearing. Justice must not only be done but must manifestly be seen to be done. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the processes by which those decisions are made, an opportunity that expresses their dignity as persons. (Paras 46 and 47)

Normally to the reply received to the notice under Section 314 the Commissioner should apply his mind carefully to the nature and extent of encroachment and also to the time to be allowed for removal of the encroachment. He must bring human compassion to the situation arising out of the destruction of dwelling places. (Para 46)

S.L. Kapoor v. Jagmohan, (1980) 4 SCC 379 : (1981) 1 SCR 746; Ridge v. Baldwin, (1964) AC 40, 68; John v. Rees, (1970) 1 Chancery 345, 402; Annamunthodo v. Oilfields Workers' Trade Union, (1961) 3 All ER 621, 625 (HL); Margarita Fuentes et al v. Robert L. Shevin, 32 L Ed 2d 556, 574 and Chintapalli Agency Taluk Arrack Sales Cooperative Society Ltd. v. Secretary (Food and Agriculture) Government of A.P., (1977) 4 SCC 337 : (1978) 1 SCR 563, relied on

Kadish: "Methodology and Criteria in Due Process Adjudication — A Survey and Criticism", 66 Yale LJ 319, 340 (1957); Goldberg v. Kelly, 397 US 254, 264-65 (1970) (right of the poor to participate in public processes); Joint Anti-fascist Refugee Committee v. McGrath, 341 US 123, 171-172 (1951); Laurence H. Tribe: American Constitutional Law (1978 Edn., p. 503), relied on

P. The encroachments committed by the petitioners are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice. They manage to find a habitat in the pavements or slums out of sheer helplessness. Their intention or object in doing so is not to 'commit an offence or intimidate, insult or annoy any person', which is the gist of the offence of 'criminal trespass' under Section 441 of the Penal Code. (Para 49)

Q. Trespass is a tort. But, even the law of Torts requires that though a trespasser may be evicted forcibly the force used must be no greater than what is reasonable and appropriate to the occasion and, what is even more important, the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him. Besides, under the Law of Torts, necessity is a plausible defence, which enables a person to escape liability on the ground that the acts complained of are necessary to prevent greater damage, inter alia, to himself. A balance has to be struck between competing sets of values. (Para 49)

Salmond and Heuston: Law of Torts, 18th Edn. (Chapter 21, p. 463, Article 185 — 'Necessity'), relied on

Q.&L. Normally, the Court would have directed the Municipal Commissioner to afford an opportunity to the petitioners to show why the encroachments committed by them on pavements or footpaths should not be removed. But, the opportunity which was denied by the Commissioner was granted in an ample measure, both sides having made their contentions elaborately on facts as well as on law. Having considered those contentions, it is clear that the Commissioner was justified in directing the removal of the encroachments committed by the petitioners on pavements, footpaths or accessory roads. (Para 51)

Ultimately there is no short term solution to squatter colonies. The phenomenon is universal more so in developing countries. Decongestion of cities can be controlled by creating alternative job opportunities in rural areas and to spread them evenly in urban areas. (Para 57)

[Ed. (1) *Re Sant Ram* case distinguished in the present judgment was decided by a five-Judge Bench. That case was later affirmed by a three-Judge Bench in *A.V. Nachane v. Union of India*, (1982) 1 SCC 205: 1982 SCC (L&S) 53. Having regard to these two decisions a three-Judge Bench of the Court in *Begulla Bapi Raju v. State of A.P.*, (1984) 1 SCC 66 concluded that the view taken in *Sant Ram* and *Nachane* that 'life' in Article 21 does not include livelihood still held the field. In view of the contrary decision rendered by a five-Judge Bench in the present case, the decision in the aforesaid cases must be deemed to be either limited or impliedly overruled by the present judgment. The view of Desai, J. (speaking for himself and R.B. Misra, J.) in *Board of Trustees of the Port of Bombay v. Dilipkumar Raghavendranath Nadkarni*, (1983) 1 SCC 124: 1983 SCC (L&S) 61 appears to be more akin to the present position when in the context of service jurisprudence he observed that the word 'life' in Article 21 includes livelihood and that where the outcome of a departmental enquiry is likely to adversely affect reputation or livelihood of a person, "some of the final graces of human civilisation which make life worth living would be jeopardised and the same can be put in jeopardy only by law which inheres fair procedure".

(2) The view of the Court in the present case that the principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in understanding and interpreting the meaning and content of fundamental rights is in consonance with the following observations of Chinnappa Reddy, J. (for himself and on behalf of A.P. Sen and Baharul Islam, JJ.) in *Randhir Singh v. Union of India*, (1982) 1 SCC 618: 1982 SCC (L&S) 119 in the context of the concept of 'equal pay for equal work' in service jurisprudence:

"It is true that the principle of 'equal pay for equal work' is not expressly declared by our Constitution to be fundamental right. Article 39(d) of the Constitution proclaims "equal pay for equal work for both men and women"

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as a Directive Principle of State Policy....Directive Principles, as has been pointed out in some of the judgments of this Court, have to be read into the fundamental rights as a matter of interpretation.... Construing Articles 14 and 16 in the light of the Preamble and Article 39(d), we are of the view that the principle 'equal pay for equal work' is deducible from those Articles...."

However, in *Kishori Mohanlal Bakshi v. Union of India*, AIR 1962 SC 1139 : (1962) 44 ITR 532 a Constitution Bench of the Court had observed that "the abstract doctrine of equal pay for equal work has nothing to do with Article 14". In a recent case viz. *P. Savita v. Union of India*, 1985 Supp SCC 94 relating to pay scales of Government servants it was brought to the notice of the Court that the observations made in *Kishori Mohanlal Bakshi*, may perhaps run counter to those made in *Randhir Singh*. The Court observed in the context as follows :

"The above decision of this Court (*Randhir Singh* case) has enlarged the doctrine of equal pay for equal work, envisaged in Article 39(d) of the Constitution of India and has exalted it to the position of a fundamental right by reading it along with Article 14. This exposition of law had given rise to some whispering dissent in that the doctrine had been extended beyond permissible limits...."

The Court however did not consider the matter at length and decided the case on ground of violation of Article 14.]

R-M/7032/L

Advocates who appeared in this case :

Ms Indira Jaisingh, Ms Kamini Jaiswal, Anand Grover and Sumet Kachhwaha, Advocates for the Petitioners in W.P. Nos. 4610-12 of 1981 ;
Ram Jethmalani and V.M. Tarkunde, Senior Advocates (Miss Darshna Bhogilal, Mrs Indu Sharma and P.H. Parekh, Advocates, with them), for the Petitioners in W.P. Nos. 5068-79 of 1981 ;
L.N. Sinha, Attorney-General (P. Shankaranarayanan and M.N. Shroff, Advocates, with him), for Respondents 2 and 3 in W.P. Nos. 4610-12 of 1981, and for Respondents 1 and 3 in W.P. Nos. 5068-79 of 1981 ;
K.K. Singhvi, Senior Advocate (F.N.D. Mollo and D.N. Mishra, Advocates, with him), for Respondent 1 in W.P. Nos. 4610-12 and for Respondent 2 in W.P. Nos. 5068-79 of 1981.

The Judgment of the Court was delivered by

CHANDRACHUD, C.J.—These writ petitions portray the plight of lacs of persons who live on pavements and in slums in the city of Bombay. They constitute nearly half the population of the city. The first group of petitions relates to pavement dwellers while the second group relates to both pavement and basti or slum dwellers. Those who have made pavements their homes exist in the midst of filth and squalor, which has to be seen to be believed. Rabid dogs in search of stinking meat and cats in search of hungry rats keep them company. They cook and sleep where they ease, for no conveniences are available to them. Their daughters, come of age, bathe under the nosy gaze of passers-by, unmindful of the feminine sense of bashfulness. The cooking and washing over, women pick lice from each other's hair. The boys beg. Menfolk, without occupation, snatch

chains with the connivance of the defenders of law and order ; when caught, if at all, they say : "Who doesn't commit crimes in this city ?"

2. It is these men and women who have come to this Court to ask for a judgment that they cannot be evicted from their squalid shelters without being offered alternative accommodation. They rely for their rights on Article 21 of the Constitution which guarantees that no person shall be deprived of his life except according to procedure established by law. They do not contend that they have a right to live on the pavements. Their contention is that they have a right to live, a right which cannot be exercised without the means of livelihood. They have no option but to flock to big cities like Bombay, which provide the means of bare subsistence. They only choose a pavement or a slum which is nearest to their place of work. In a word, their plea is that the right to life is illusory without a right to the protection of the means by which alone life can be lived. And, the right to life can only be taken away or abridged by a procedure established by law, which has to be fair and reasonable, not fanciful or arbitrary such as is prescribed by the Bombay Municipal Corporation Act or the Bombay Police Act. They also rely upon their right to reside and settle in any part of the country which is guaranteed by Article 19(1)(e).

3. The three petitioners in the group of Writ Petitions 4610-4612 of 1981 are a journalist and two pavement dwellers. One of these two pavement dwellers, P. Angamuthu, migrated from Salem, Tamil Nadu, to Bombay in the year 1961 in search of employment. He was a landless labourer in his home town but he was rendered jobless because of drought. He found a job in a Chemical company at Dahisar, Bombay, on a daily wage of Rs 23 per day. A slum-lord extorted a sum of Rs 2500 from him in exchange of a shelter of plastic sheets and canvas on a pavement on the Western Express Highway, Bombay. He lives in it with his wife and three daughters who are 16, 13 and 5 years of age.

4. The second of the two pavement dwellers came to Bombay in 1969 from Sangamner, District Ahmednagar, Maharashtra. He was a cobbler earning 7 to 8 rupees a day, but his so-called house in the village fell down. He got employment in Bombay as a badli kamgar for Rs 350 per month. He was lucky in being able to obtain a "dwelling house" on a pavement at Tulsiwadi by paying Rs 300 to a goonda of the locality. The bamboos and the plastic sheets cost him Rs 700.

5. On July 13, 1981 the then Chief Minister of Maharashtra, Shri A.R. Antulay, made an announcement which was given wide

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publicity by the newspapers that, all pavement dwellers in the city of Bombay will be evicted forcibly and deported to their respective places of origin or removed to places outside the city of Bombay. The Chief Minister directed the Commissioner of Police to provide the necessary assistance to respondent 1, the Bombay Municipal Corporation, to demolish the pavement dwellings and deport the pavement dwellers. The apparent justification which the Chief Minister gave to his announcement was: "It is a very inhuman existence. These structures are flimsy and open to the elements. During the monsoon there is no way these people can live comfortably."

6. On July 23, 1981 the pavement dwelling of P. Angamuthu was demolished by the officers of the Bombay Municipal Corporation. He and the members of his family were put in a bus for Salem. His wife and daughters stayed back in Salem but he returned to Bombay in search of a job and got into a pavement house once again. The dwelling of the other petitioner was demolished even earlier, in January 1980 but he rebuilt it. It is like a game of hide and seek. The Corporation removes the ramshackle shelters on the pavements with the aid of police, the pavement dwellers flee to less conspicuous pavements in by-lanes and, when the officials are gone, they return to their old habitats. Their main attachment to those places is the nearness thereof to their place of work.

7. In the other batch of Writ Petitions Nos. 5068-79 of 1981, which was heard along with the petitions relating to pavement dwellers, there are 12 petitioners. The first five of these are residents of Kamraj Nagar, a basti or habitation which is alleged to have come into existence in about 1960-61, near the Western Express Highway, Bombay. The next four petitioners were residing in structures constructed off the Tulsi Pipe Road, Mahim, Bombay. Petitioner 10 is the Peoples' Union for Civil Liberties, petitioner 11 is the Committee for the Protection of Democratic Rights while petitioner 12 is a journalist.

8. The case of the petitioners in the Kamraj Nagar group of cases is that there are over 500 hutments in this particular basti, which was built in about 1960 by persons who were employed by a Construction company engaged in laying water pipes along the Western Express Highway. The residents of Kamraj Nagar are municipal employees, factory or hotel workers, construction supervisors and so on. The residents of the Tulsi Pipe Road hutments claim that they have been living there for 10 to 15 years and that, they are engaged in various small trades. On hearing about the Chief Minister's announcement, they filed a writ petition in the High Court of Bombay for an order of injunction restraining the officers of the State Government and the Bombay Municipal Corporation from implementing the directive of

the Chief Minister. The High Court granted an ad-interim injunction to be in force until July 21, 1981. On that date, respondents agreed that the huts will not be demolished until October 15, 1981. However, it is alleged, on July 23, 1981 the petitioners were huddled into State Transport buses for being deported out of Bombay. Two infants were born during the deportation but that was set off by the death of two others.

9. The decision of the respondents to demolish the huts is challenged by the petitioners on the ground that it is violative of Articles 19 and 21 of the Constitution. The petitioners also ask for a declaration that the provisions of Sections 312, 313 and 314 of the Bombay Municipal Corporation Act, 1888 are invalid as violating Articles 14, 19 and 21 of the Constitution. The reliefs asked for in the two groups of writ petitions are that the respondents should be directed to withdraw the decision to demolish the pavement dwellings and the slum hutments and, where they are already demolished, to restore possession of the sites to the former occupants.

10. On behalf of the Government of Maharashtra, a counter-affidavit has been filed by V.S. Munje, Under-Secretary in the Department of Housing. The counter-affidavit meets the case of the petitioners thus. The Government of Maharashtra neither proposed to denot any pavement dweller out of the city of Bombay nor did it, in fact, deport anyone. Such of the pavement dwellers, who expressed their desire in writing, that they wanted to return to their home towns and who sought assistance from the Government in that behalf were offered transport facilities up to the nearest rail head and were also paid railway fare or bus fare and incidental expenses for the onward journey. The Government of Maharashtra had issued instructions to its officers to visit specific pavements on July 23, 1981 and to ensure that no harassment was caused to any pavement dweller. Out of 10,000 hutment-dwellers who were likely to be affected by the proposed demolition of hutments constructed on the pavements, only 1024 persons opted to avail of the transport facility and the payment of incidental expenses.

11. The counter-affidavit says that no person has any legal right to encroach upon or to construct any structure on a footpath, public street or on any place over which the public has a right of way. Numerous hazards of health and safety arise if action is not taken to remove such encroachments. Since, no civic amenities can be provided on the pavements, the pavement dwellers use pavements or adjoining streets for easing themselves. Apart from this, some of the pavement dwellers indulge in anti-social acts like chain-snatching, illicit distillation of liquor and prostitution. The lack of proper

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environment leads to increased criminal tendencies, resulting in more crime in the cities. It is, therefore, in public interest that public places like pavements and paths are not encroached upon. The Government of Maharashtra provides housing assistance to the weaker sections of the society like landless labourers and persons belonging to low income groups, within the framework of its planned policy of the economic and social development of the State. Any allocation for housing has to be made after balancing the conflicting demands from various priority sectors. The paucity of resources is a restraining factor on the ability of the State to deal effectively with the question of providing housing to the weaker sections of the society. The Government of Maharashtra has issued policy directives that 75% of the housing programme should be allocated to the lower income groups and the weaker sections of the society. One of the objects of the State's planning policy is to ensure that the influx of population from the rural to the urban areas is reduced in the interest of a proper and balanced social and economic development of the State and of the country. This is proposed to be achieved by reversing the rate of growth of metropolitan cities and by increasing the rate of growth of small and medium towns. The State Government has therefore devised an Employment Guarantee Scheme to enable the rural population, which remains unemployed or underemployed at certain periods of the year, to get employment during such periods. A sum of about Rs 180 crores was spent on that scheme during the years 1979-80 and 1980-81. On October 2, 1980 the State Government launched two additional schemes for providing employment opportunities for those who cannot get work due to old age or physical infirmities. The State Government has also launched a scheme for providing self-employment opportunities under the 'Sanjay Gandhi Niradhar Anudan Yojana'. A monthly pension of Rs 60 is paid to those who are too old to work or are physically handicapped. In this scheme, about 1,56,943 persons have been identified and a sum of Rs 2.25 crores was disbursed. Under another scheme called 'Sanjay Gandhi Swawalamban Yojana', interest-free loans, subject to a maximum of Rs 2500, were being given to persons desiring to engage themselves in gainful employment of their own. About 1,75,000 persons had benefited under this scheme, to whom a total sum of Rs 5.82 crores was disbursed by way of loan. In short, the objective of the State Government was to place greater emphasis on providing infrastructural facilities to small and medium towns and to equip them so that they could act as growth and service centres for the rural hinterland. The phenomenon of poverty which is common to all developing countries has to be tackled on an all-India basis by making the gains of development available to all sections of the society through a policy of equitable distribution of income and wealth. Urbanisation is a major problem facing the

entire country, the migration of people from the rural to the urban areas being a reflection of the colossal poverty existing in the rural areas. The rural poverty cannot, however, be eliminated by increasing the pressure of population on metropolitan cities like Bombay. The problem of poverty has to be tackled by changing the structure of the society in which there will be a more equitable distribution of income and greater generation of wealth. The State Government has stepped up the rate of construction of tenements for the weaker sections of the society from 2500 to 9500 per annum.

12. It is denied in the counter-affidavit that the provisions of Sections 312, 313 and 314 of the Bombay Municipal Corporation Act violate the Constitution. Those provisions are conceived in public interest and great care is taken by the authorities to ensure that no harassment is caused to any pavement dweller while enforcing the provisions of those sections. The decision to remove such encroachments was taken by the Government with specific instructions that every reasonable precaution ought to be taken to cause the least possible inconvenience to the pavement dwellers. What is more important, so the counter-affidavit says, the Government of Maharashtra had decided that, on the basis of the census carried out in 1976, pavement dwellers who would be uprooted should be offered alternate developed pitches at Malvani where they could construct their own hutments. According to that census, about 2500 pavement hutments only were then in existence.

13. The counter-affidavit of the State Government describes the various steps taken by the Central Government under the Five Year Plan of 1978-83, in regard to the housing programmes. The plan shows that the inadequacies of Housing policies in India have both quantitative and qualitative dimensions. The total investment in housing shall have to be of the magnitude of Rs 2790 crores, if the housing problem has to be tackled even partially.

14. On behalf of the Bombay Municipal Corporation, a counter-affidavit has been filed by Shri D.M. Sukthankar, Municipal Commissioner of Greater Bombay. That affidavit shows that he had visited the pavements on the Tulsi Pipe Road (Senapati Bapat Marg) and the Western Express Highway, Vile Parle (East), Bombay. On July 23, 1981, certain hutments on these pavements were demolished under Section 314 of the Bombay Municipal Corporation Act. No prior notice of demolition was given since the section does not provide for such notice. The affidavit denies that the intense speculation in land prices, as alleged, owes its origin to the high rise buildings which have come up in the city of Bombay. It is also denied that there are vast vacant pieces of land in the city which can be utilised for

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housing the pavement dwellers. Section 61 of the B.M.C. Act lays down the obligatory duties of the Corporation. Under clauses (c) and (d) of the said section, it is the duty of the Corporation to remove excrementitious matters, refuse and rubbish and to take measures for abatement of every kind of nuisance. Under clause (g) of that section, the Corporation is under an obligation to take measures for preventing and checking the spread of dangerous diseases. Under clause (o), obstructions and projections in or upon public streets and other public places have to be removed. Section 63(k) empowers the Corporation to take measures to promote public safety, health or convenience, not specifically provided otherwise. The object of Sections 312 to 314 is to keep the pavements and footpaths free from encroachment so that the pedestrians do not have to make use of the streets on which there is heavy vehicular traffic. The pavement dwellers answer the nature's call, bathe, cook and wash their clothes and utensils on the footpaths and on parts of public streets adjoining the footpaths. Their encroachment creates serious impediments in repairing the roads, footpaths and drains. The refusal to allow the petitioners and other persons similarly situated to use footpaths as their abodes is, therefore, not unreasonable, unfair, or unlawful. The basic civic amenities, such as drainage, water and sanitation, cannot possibly be provided to the pavement dwellers. Since the pavements are encroached upon, pedestrians are compelled to walk on the streets, thereby increasing the risk of traffic accidents and impeding the free flow of vehicular movement. The Municipal Commissioner disputes in his counter-affidavit that any fundamental right of the petitioners is infringed by removal of the encroachment committed by them on public property, especially the pavements. In this behalf, reliance is placed upon an order dated July 27, 1981 of Lentin, J. of the Bombay High Court, which records that counsel for the petitioners had stated expressly on July 24, 1981, that no fundamental right could be claimed to put up a dwelling on public footpaths and public roads.

15. The Municipal Commissioner has stated in his counter-affidavit in Writ Petitions 5068-79 of 1981 that the huts near the Western Express Highway, Vile Parle, Bombay, were constructed on an accessory road which is a part of the Highway itself. These hutments were never regularised by the Corporation and no registration numbers were assigned to them.

16. In answer to the Municipal Commissioner's counter-affidavit, petitioner 12, Prafullachandra Bidwai who is a journalist, has filed a rejoinder asserting that Kamraj Nagar is not located on a footpath or a pavement. According to him, Kamraj Nagar is a basti off the Highway, in which the huts are numbered, the record in relation to which is maintained by the Road Development Department and the

Bombay Municipal Corporation. Contending that petitioners 1 to 5 have been residing in the said basti for over 20 years, he reiterates that the public has no right of way in or over the Kamraj Nagar. He also disputes that the huts on the footpaths cause any obstruction to the pedestrians or to the vehicular traffic or that those huts are a source of nuisance or danger to public health and safety. His case in paragraph 21 of his reply-affidavit seems to be that since, the footpaths are in the occupation of pavement dwellers for a long time, footpaths have ceased to be footpaths. He says that the pavement dwellers and the slum or basti dwellers, who number about 47.7 lacs, constitute about 50% of the total population of Greater Bombay, that they supply the major work force for Bombay from menial jobs to the most highly skilled jobs, that they have been living in the hutments for generations, that they have been making a significant contribution to the economic life of the city and that, therefore, it is unfair and unreasonable on the part of the State Government and the Municipal Corporation to destroy their homes and deport them: A home is a home wherever it is. The main theme of the reply-affidavit is that "The slum dwellers are the sine qua non of the city. They are entitled to a quid pro quo". It is conceded expressly that the petitioners do not claim any fundamental right to live on the pavements. The right claimed by them is the right to live, at least to exist.

17. Only two more pleadings need be referred to, one of which is an affidavit of Shri Anil V. Gokak, Administrator of Maharashtra Housing and Areas Development Authority, Bombay, who was then holding charge of the post of Secretary, Department of Housing. He filed an affidavit in answer to an application for the modification of an interim order which was passed by this Court on October 19, 1981. He says that the Legislature of Maharashtra had passed the Maharashtra Vacant Lands (Prohibition of Unauthorised Occupation and Summary Eviction) Act, 1975 in pursuance of which the Government had decided to compile a list of slums which were required to be removed in public interest. It was also decided that after a spot inspection, 500 acres of vacant lands in and near the Bombay Suburban District should be allocated for re-settlement of the hutment dwellers who were removed from the slums. A Task Force was constituted by the Government for the purpose of carrying out a census of the hutments standing on lands belonged to the Government of Maharashtra. the Bombay Municipal Corporation and the Bombay Housing Board. A census was, accordingly, carried out on January 4, 1976 by deploying about 7000 persons to enumerate the slum dwellers spread over approximately 850 colonies all over Bombay. About 67% of the hutment dwellers from a total of about 2,60,000 hutments produced photographs of the heads of their families, on the basis of which

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hutments were numbered and their occupants were given identity cards. It was decided that slums which were in existence for a long time and which were improved and developed would not normally be demolished unless the land was required for a public purpose. In the event that the land was so required, the policy of the State Government was to provide alternative accommodation to the slum dwellers who were censused and possessed identity cards. This is borne out by a circular of the Government dated February 4, 1976 (No. SIS 1176/D. 41). Shri Gokak says that the State Government has issued instructions directing, inter alia, that "action to remove the slums excepting those which 'are on the footpaths or roads or which are new or casually located should not, therefore, be taken without obtaining approval from the Government to the proposal for the removal of such slums and their rehabilitation". Since, it was never the policy of the Government to encourage construction of hutments on footpaths, pavements or other places over which the public has a right of way, no census of such hutments was ever intended to be conducted. But, sometime in July 1981, when the Government officers made an effort to ascertain the magnitude of the problem of evicting pavement dwellers, it was discovered that some persons occupying pavements carried census cards of 1976. The Government then decided to allot pitches to such occupants of pavements.

18. The only other pleading which deserves to be noticed is the affidavit of the journalist petitioner, Ms Olga Tellis, in reply to the counter-affidavit of the Government of Maharashtra. According to her, one of the important reasons of the emergence and growth of squatter-settlements in the metropolitan cities in India is, that the development and master plans of most of the cities have not been adhered to. The density of population in the Bombay metropolitan region is not high according to the Town Planning standards. Difficulties are caused by the fact that the population is not evenly distributed over the region, in a planned manner. New constructions of commercial premises, small-scale industries and entertainment houses in the heart of the city, have been permitted by the Government of Maharashtra contrary to law and even residential premises have been allowed to be converted into commercial premises. This, coupled with the fact that the State Government has not shifted its main offices to the northern region of the city, has led to the concentration of the population in the southern region due to the availability of job opportunities in that region. Unless economic and leisure activity is decentralised, it would be impossible to find a solution to the problems arising out of the growth of squatter colonies. Even if squatters are evicted, they come back to the city because, it is there that job opportunities are available. The alternate pitches provided to the displaced pavement

dwellers on the basis of the so-called 1976 census, are not an effective means to their resettlement because, those sites are situated far away from the Malad Railway Station involving cost and time which are beyond their means. There are no facilities available at Malavani like schools and hospitals, which drives them back to the stranglehold of the city. The permission granted to the 'National Centre of Performing Arts' to construct an auditorium at the Nariman Point, Backbay Reclamation, is cited as a 'gross' instance of the short-sighted, suicidal and discriminatory policy of the Government of Maharashtra. It is as if the sea is reclaimed for the construction of business and entertainment houses in the centre of the city, which creates job opportunities to which the homeless flock. They work therein and live on pavements. The grievance is that, as a result of this imbalance, there are not enough jobs available in the northern tip of the city. The improvement of living conditions in the slums and the regional distribution of job opportunities are the only viable remedies for relieving congestion of the population in the centre of the city. The increase allowed by the State Government in the Floor Space Index over and above 1.33, has led to a further concentration of population in the centre of the city.

19. In the matter of housing, according to Ms Tellis' affidavit, Government has not put to the best use the finances and resources available to it. There is a wide gap between the demand and supply in the area of housing which was in the neighbourhood of forty five thousand units in the decade 1971-81. A huge amount of hundreds of crores of rupees shall have to be found by the State Government every year during the period of the Sixth Plan if adequate provision for housing is at all to be made. The Urban Land Ceiling Act has not achieved its desired objective nor has it been properly implemented. The employment schemes of the State Government are like a drop in the ocean and no steps are taken for increasing job opportunities in the rural sector. The neglect of health, education, transport and communication in that sector drives the rural folk to the cities, not only in search of a living but in search of the basic amenities of life. The allegation of the State Government regarding the criminal propensities of the pavement dwellers is stoutly denied in the reply-affidavit and it is said to be contrary to the studies of many experts. Finally, it is stated that it is no longer the objective of the Sixth Plan to reverse the rate of growth of metropolitan cities. The objective of the earlier plan (1978-83) has undergone a significant change and the target now is to ensure the growth of large metropolitan cities in a planned manner. The affidavit claims that there is adequate land in the Bombay metropolitan region to absorb a population of 20 million people, which is expected to be reached by the year 2000 A.D.

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20. The arguments advanced before us by Ms Indira Jaising, Mr V.M. Tarkunde and Mr Ram Jethmalani cover a wide range but the main thrust of the petitioners' case is that evicting a pavement dweller or slum dweller from his habitat amounts to depriving him of his right to livelihood, which is comprehended in the right guaranteed by Article 21 of the Constitution that no person shall be deprived of his life except according to procedure established by law. The question of the guarantee of personal liberty contained in Article 21 does not arise and was not raised before us. Counsel for the petitioners contended that the Court must determine in these petitions the content of the right to life, the function of property in a welfare state, the dimension and true meaning of the constitutional mandate that property must subserve common good, the sweep of the right to reside and settle in any part of the territory of India which is guaranteed by Article 19(1)(e), and the right to carry on any occupation, trade or business which is guaranteed by Article 19(1)(g), the competing claims of pavement dwellers on the one hand and of the pedestrians on the other and, the large question of ensuring equality before the law. It is contended that it is the responsibility of the courts to reduce inequalities and social imbalances by striking down statutes which perpetuate them. One of the grievances of the petitioners against the Bombay Municipal Corporation Act, 1888 is that it is a century old antiquated piece of legislation passed in an era when pavement dwellers and slum dwellers did not exist and the consciousness of the modern notion of a welfare state was not present to the mind of the colonial legislature. According to the petitioners, connected with these issues and yet independent of them, is the question of the role of the Court in setting the tone of values in a democratic society.

21. The argument which bears on the provisions of Article 21 is elaborated by saying that the eviction of pavement and slum dwellers will lead, in a vicious circle, to the deprivation of their employment, their livelihood and, therefore, to the right to life. Our attention is drawn in this behalf to an extract from the judgment of Douglas, J. in *Baksey v. Board of Regents*¹, in which the learned Judge said :

The right to work, I had assumed was the most precious liberty that man possesses. Man has indeed, as much right to work as he has to live, to be free and to own property. To work means to eat, It also means to live.

The right to live and the right to work are integrated and inter-dependant and, therefore, if a person is deprived of his job as a result of his eviction from a slum or a pavement, his very right to life is put in jeopardy. It is urged that the economic compulsions under

1. 347 US 442, 472: 98 L Ed 829 (1954).

which these persons are forced to live in slums or on pavements impart to their occupation the character of a fundamental right.

22. It is further urged by the petitioners that it is constitutionally impermissible to characterise the pavement dwellers as "trespassers" because, their occupation of pavements arises from economic compulsions. The State is under an obligation to provide to the citizens the necessities of life and, in appropriate cases, the courts have the power to issue orders directing the State, by affirmative action, to promote and protect the right to life. The instant situation is one of crisis, which compels the use of public property for the purpose of survival and sustenance. Social commitment is the quintessence of our Constitution which defines the conditions under which liberty has to be enjoyed and justice has to be administered. Therefore, directive principles, which are fundamental in the governance of the country, must serve as a beacon light to the interpretation of the constitutional provisions. Viewed in this context, it is urged, the impugned action of the State Government and the Bombay Municipal Corporation is violative of the provisions contained in Articles 19(1)(e), 19(1)(g) and 21 of the Constitution. The paucity of financial resources of the State is no excuse for defeating the fundamental rights of the citizens.

23. In support of this argument, reliance is placed by the petitioners on what is described as the 'factual context'. A publication dated January 1982 of the Planning Commission, Government of India, namely, *The Report of the Expert Group of Programmes for the Alleviation of Poverty*, is relied on as showing the high incidence of poverty in India. That Report shows that in 1977-78, 48% of the population lived below the poverty line, which means that out of a population of 303 million who lived below the poverty line, 252 million belonged to the rural areas. In 1979-80 another 8 million people from the rural areas were found to live below the poverty line. A Government of Maharashtra Publication *Budget and the New 20-Point Socio-Economic Programme* estimates that there are about 45 lac families in rural areas of Maharashtra who live below the poverty line. Another 40% was in the periphery of that area. One of the major causes of the persistent rural poverty of landless labourers, marginal farmers, shepherds, physically handicapped persons and others is the extremely narrow base of production available to the majority of the rural population. The average agricultural holding of a farmer is 0.4 hectares, which is hardly adequate to enable him to make both ends meet. Landless labourers have no resource base at all and they constitute the hard core of poverty. Due to economic pressures and lack of employment opportunities, the rural population is forced to migrate to urban areas in search of employment. *The Economic Survey of Maharashtra* published by the State Government shows that

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the bulk of public investment was made in the cities of Bombay, Pune and Thane, which created employment opportunities attracting the starving rural population to those cities. The slum census conducted by the Government of Maharashtra in 1976 shows that 79% of the slum dwellers belonged to the low income group with a monthly income below Rs 600. The study conducted by P. Ramachandran of the Tata Institute of Social Sciences shows that in 1972, 91% of the pavement dwellers had a monthly income of less than Rs 200. The cost of obtaining any kind of shelter in Bombay is beyond the means of a pavement dweller. The principal public housing sectors in Maharashtra, namely, The Maharashtra Housing and Area Development Agency (MHADA) and the City and Industrial Development Corporation of Maharashtra Ltd. (CIDCO) have been able to construct only 3000 and 1000 units respectively as against the annual need of 60,000 units. In any event, the cost of housing provided even by these public sector agencies is beyond the means of the slum and pavement dwellers. Under the Urban Land (Ceiling and Regulation) Act, 1975, private land owners and holders are given facility to provide housing to the economically weaker sections of the society at a stipulated price of Rs 90 per sq. ft., which also is beyond the means of the slum and pavement dwellers. The reigning market price of houses in Bombay varies from Rs 150 per sq. ft. outside Bombay to Rs 2000 per sq. ft. in the centre of the city.

24. The petitioners dispute the contention of the respondents regarding the non-availability of vacant land for allotment to houseless persons. According to them, about 20,000 hectares of unencumbered land is lying vacant in Bombay. The Urban Land (Ceiling and Regulation) Act, 1975 has failed to achieve its object as is evident from the fact that in Bombay, 5% of the land-holders own 55% of the land. Even though 2952.83 hectares of urban land is available for being acquired by the State Government as being in excess of the permissible ceiling area, only 41.51% of this excess land was, so far, acquired. Thus, the reason why there are homeless people in Bombay is not that there is no land on which homes can be built for them but, that the planning policy of the State Government permits high density areas to develop with vast tracts of land lying vacant. The pavement dwellers and the slum dwellers who constitute 50% of the population of Bombay, occupy only 25% of the city's residential land. It is in these circumstances that out of sheer necessity for a bare existence, the petitioners are driven to occupy the pavements and slums. They live in Bombay because they are employed in Bombay and they live on pavements because there is no other place where they can live. This is the factual context in which the petitioners claim the right under Articles 19(1)(e) and (g) and Article 21 of the Constitution.

25. The petitioners challenge the vires of Section 314 read with Sections 312 and 313 of the Bombay Municipal Corporation Act, which empowers the Municipal Commissioner to remove, without notice, any object or structure or fixture which is set up in or upon any street. It is contended that, in the first place, Section 314 does not authorise the demolition of a dwelling even on a pavement and secondly, that a provision which allows the demolition of a dwelling without notice is not just, fair or reasonable. Such a provision vests arbitrary and unguided power in the Commissioner. It also offends against the guarantee of equality because, it makes an unjustified discrimination between pavement dwellers on the one hand and pedestrians on the other. If the pedestrians are entitled to use the pavements for passing and repassing, so are the pavement dwellers entitled to use pavements for dwelling upon them. So the argument goes. Apart from this, it is urged, the restrictions which are sought to be imposed by the respondents on the use of pavements by pavement dwellers are not reasonable. A State which has failed in its constitutional obligation to usher in a socialistic society has no right to evict slum and pavement dwellers who constitute half of the city's population. Therefore, Sections 312, 313 and 314 of the B.M.C. Act must either be read down or struck down.

26. According to the learned Attorney-General and Mr K.K. Singhvi and Mr Shankaranarayanan who appear for the respondents, no one has a fundamental right, whatever be the compulsion, to squat on or construct a dwelling on a pavement, public road or any other place to which the public has a right of access. The right conferred by Article 19(1)(e) of the Constitution to reside and settle in any part of India cannot be read to confer a licence to encroach and trespass upon public property. Section 3(iv) and (x) of the B.M.C. Act define "Street" and "Public Street" to include a highway, a footway or a passage on which the public has the right of passage or access. Under Section 289(1) of the Act, all pavements and public streets vest in the Corporation and are under the control of the Commissioner. Insofar as Article 21 is concerned, no deprivation of life, either directly or indirectly, is involved in the eviction of the slum and pavement dwellers from public places. The Municipal Corporation is under an obligation under Section 314 of the B.M.C. Act to remove obstructions on pavements, public streets and other public places. The Corporation does not even possess the power to permit any person to occupy a pavement or a public place on a permanent or quasi-permanent basis. The petitioners have not only violated the provisions of the B.M.C. Act, but they have contravened Sections 111 and 115 of the Bombay Police Act also. These sections prevent a person from obstructing any other person in the latter's use of a street or public place or from

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committing a nuisance. Section 117 of the Police Act prescribes punishment for the violation of these sections.

27. We will first deal with the preliminary objection raised by Mr K.K. Singhvi, who appears on behalf of the Bombay Municipal Corporation, that the petitioners are estopped from contending that their huts cannot be demolished by reason of the fundamental rights claimed by them. It appears that a writ petition, No. 986 of 1981, was filed on the Original Side of the Bombay High Court by and on behalf of the pavement dwellers claiming reliefs similar to those claimed in the instant batch of writ petitions. A learned Single Judge granted an ad-interim injunction restraining the respondents from demolishing the huts and from evicting the pavement dwellers. When the petition came up for hearing on July 27, 1981, counsel for the petitioners made a statement in answer to a query from the court, that no fundamental right could be claimed to put up dwellings on footpaths or public roads. Upon this statement, respondents agreed not to demolish until October 15, 1981, huts which were constructed on the pavements or public roads prior to July 23, 1981. On August 4, 1981, a written undertaking was given by the petitioners agreeing, inter alia, to vacate the huts on or before October 15, 1981 and not to obstruct the public authorities from demolishing them. Counsel appearing for the State of Maharashtra responded to the petitioners' undertaking by giving an undertaking on behalf of the State Government that, until October 15, 1981, no pavement dweller will be removed out of the city against his wish. On the basis of these undertakings, the learned Judge disposed of the writ petition without passing any further orders. The contention of the Bombay Municipal Corporation is that since the pavement dwellers had conceded in the High Court that they did not claim any fundamental right to put up huts on pavements or public roads and since they had given an undertaking to the High Court that they will not obstruct the demolition of the huts after October 15, 1981, they are estopped from contending in this Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood, which is comprehended within the fundamental right to life guaranteed by Article 21 of the Constitution.

28. It is not possible to accept the contention that the petitioners are estopped from setting up their fundamental rights as a defence to the demolition of the huts put up by them on pavements or parts of public roads. There can be no estoppel against the Constitution. The Constitution is not only the paramount law of the land but, it is the source and sustenance of all laws. Its provisions are conceived in public interest and are intended to serve a public purpose. The doctrine of estoppel is based on the principle that consistency in word and action imparts certainty and honesty to human affairs. If a person

makes a representation to another, on the faith of which the latter acts to his prejudice, the former cannot resile from the representation made by him. He must make it good. This principle can have no application to representations made regarding the assertion or enforcement of fundamental rights. For example, the concession made by a person that he does not possess and would not exercise his right to free speech and expression or the right to move freely throughout the territory of India cannot deprive him of those constitutional rights, any more than a concession that a person has no right of personal liberty can justify his detention contrary to the terms of Article 22 of the Constitution. Fundamental rights are undoubtedly conferred by the Constitution upon individuals which have to be asserted and enforced by them, if those rights are violated. But, the high purpose which the Constitution seeks to achieve by conferment of fundamental rights is not only to benefit individuals but to secure the larger interests of the community. The Preamble of the Constitution says that India is a democratic Republic. It is in order to fulfil the promise of the Preamble that fundamental rights are conferred by the Constitution, some on citizens like those guaranteed by Articles 15, 16, 19, 21 and 29 and, some on citizens and non-citizens alike, like those guaranteed by Articles 14, 21, 22 and 25 of the Constitution. No individual can barter away the freedoms conferred upon him by the Constitution. A concession made by him in a proceeding, whether under a mistake of law or otherwise, that he does not possess or will not enforce any particular fundamental right, cannot create an estoppel against him in that or any subsequent proceeding. Such a concession, if enforced, would defeat the purpose of the Constitution. Were the argument of estoppel valid, an all-powerful State could easily tempt an individual to forego his precious personal freedoms on promise of transitory, immediate benefits. Therefore, notwithstanding the fact that the petitioners had conceded in the Bombay High Court that they have no fundamental right to construct hutments on pavements and that they will not object to their demolition after October 15, 1981, they are entitled to assert that any such action on the part of public authorities will be in violation of their fundamental rights. How far the argument regarding the existence and scope of the right claimed by the petitioners is well-founded is another matter. But, the argument has to be examined despite the concession.

29. The plea of estoppel is closely connected with the plea of waiver, the object of both being to ensure bona fides in day-to-day transactions. In *Basheshar Nath v. CIT*², a Constitution Bench of this Court considered the question whether the fundamental rights

2. 1959 Supp 1 SCR 528 : AIR 1959 SC 149 : (1959) 35 ITR 190

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conferred by the Constitution can be waived. Two members of the Bench (Das, C.J. and Kapoor, J.) held that there can be no waiver of the fundamental right founded on Article 14 of the Constitution. Two others (N.H. Bhagwati and Subba Rao, JJ.) held that not only could there be no waiver of the right conferred by Article 14, but there could be no waiver of any other fundamental right guaranteed by Part III of the Constitution. The Constitution makes no distinction, according to the learned Judges, between fundamental rights enacted for the benefit of an individual and those enacted in public interest or on grounds of public policy.

30. We must, therefore, reject the preliminary objection and proceed to consider the validity of the petitioners' contentions on merits.

31. The scope of the jurisdiction of this Court to deal with writ petitions under Article 32 of the Constitution was examined by a Special Bench of this Court in *Ujjam Bai v. State of U.P.*³ That decision would show that, in three classes of cases, the question of enforcement of the fundamental rights would arise, namely, (1) where action is taken under a statute which is ultra vires the Constitution; (2) where the statute is intra vires but the action taken is without jurisdiction; and (3) an authority under an obligation to act judicially passes an order in violation of the principles of natural justice. These categories are, of course, not exhaustive. In *Naresh Shridhar Mirajkar v. State of Maharashtra*⁴ a Special Bench of nine learned Judges of this Court held that, where the action taken against a citizen is procedurally ultra vires, the aggrieved party can move this Court under Article 32. The contention of the petitioners is that the procedure prescribed by Section 314 of the B.M.C. Act being arbitrary and unfair, it is not "procedure established by law" within the meaning of Article 21 and, therefore, they cannot be deprived of their fundamental right to life by resorting to that procedure. The petitions are clearly maintainable under Article 32 of the Constitution.

32. As we have stated while summing up the petitioners' case, the main plank of their argument is that the right to life which is guaranteed by Article 21 includes the right to livelihood and since they will be deprived of their livelihood if they are evicted from their slum and pavement dwellings, their eviction is tantamount to deprivation of their life and is hence unconstitutional. For purposes of argument, we will assume the factual correctness of the premise that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. Upon that assumption, the question which

3. (1963) 1 SCR 778: AIR 1962 SC 1621
4. (1966) 3 SCR 744, 770: AIR 1967 SC 1

we have to consider is whether the right to life includes the right to livelihood. We see only one answer to that question, namely, that it does. The sweep of the right to life conferred by Article 21 is wide and far reaching. It does not mean merely that life cannot be extinguished or taken away as, for example, by the imposition and execution of the death sentence, except according to procedure established by law. That is but one aspect of the right to life. An equally important facet of that right is the right to livelihood because, no person can live without the means of living, that is, the means of livelihood. If the right to livelihood is not treated as a part of the constitutional right to life, the easiest way of depriving a person of his right to life would be to deprive him of his means of livelihood to the point of abrogation. Such deprivation would not only denude the life of its effective content and meaningfulness but it would make life impossible to live. And yet, such deprivation would not have to be in accordance with the procedure established by law, if the right to livelihood is not regarded as a part of the right to life. That, which alone makes it possible to live, leave aside what makes life livable, must be deemed to be an integral component of the right to life. Deprive a person of his right to livelihood and you shall have deprived him of his life. Indeed, that explains the massive migration of the rural population to big cities. They migrate because they have no means of livelihood in the villages. The motive force which propels their desertion of their hearths and homes in the village is the struggle for survival, that is, the struggle for life. So unimpeachable is the evidence of the nexus between life and the means of livelihood. They have to eat to live: Only a handful can afford the luxury of living to eat. That they can do, namely, eat, only if they have the means of livelihood. That is the context in which it was said by Douglas, J. in *Baksey*⁵ that the right to work is the most precious liberty that man possesses. It is the most precious liberty because, it sustains and enables a man to live and the right to life is a precious freedom. "Life", as observed by Field, J. in *Munn v. Illinois*⁶, means something more than mere animal existence and the inhibition against the deprivation of life extends to all those limits and faculties by which life is enjoyed. This observation was quoted with approval by this Court in *Kharak Singh v. State of U.P.*⁶

33. Article 39(a) of the Constitution, which is a Directive Principle of State Policy, provides that the State shall, in particular, direct its policy towards securing that the citizens, men and women equally, have the right to an adequate means of livelihood. Article 41, which

5. (1877) 94 US 113

6. (1964) 1 SCR 332: AIR 1963 SC 1295: (1963) 2 Cri LJ 329

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is another Directive Principle, provides, inter alia, that the State shall, within the limits of its economic capacity and development, make effective provision for securing the right to work in cases of unemployment and of undeserved want. Article 37 provides that the Directive Principles, though not enforceable by any court, are nevertheless fundamental in the governance of the country. The principles contained in Articles 39(a) and 41 must be regarded as equally fundamental in the understanding and interpretation of the meaning and content of fundamental rights. If there is an obligation upon the State to secure to the citizens an adequate means of livelihood and the right to work, it would be sheer pedantry to exclude the right to livelihood from the content of the right to life. The State may not, by affirmative action, be compellable to provide adequate means of livelihood or work to the citizens. But, any person, who is deprived of his right to livelihood except according to just and fair procedure established by law, can challenge the deprivation as offending the right to life conferred by Article 21.

34. Learned counsel for the respondents placed strong reliance on a decision of this Court in *In Re Sant Ram*⁷ in support of their contention that the right to life guaranteed by Article 21 does not include the right to livelihood. Rule 24 of the Supreme Court Rules empowers the Registrar to publish lists of persons who are proved to be habitually acting as touts. The Registrar issued a notice to the appellant and one other person to show cause why their names should not be included in the list of touts. That notice was challenged by the appellant on the ground, inter alia, that it contravenes Article 21 of the Constitution since, by the inclusion of his name in the list of touts, he was deprived of his right to livelihood, which is included in the right to life. It was held by a Constitution Bench of this Court that the language of Article 21 cannot be pressed in aid of the argument that the word 'life' in Article 21 includes 'livelihood' also. This decision is distinguishable because, under the Constitution, no person can claim the right to livelihood by the pursuit of an opprobrious occupation or a nefarious trade or business, like toutism, gambling or living on the gains of prostitution.* The petitioners before us do not claim the right to dwell on pavements or in slums for the purpose of pursuing any activity which is illegal, immoral or contrary to public interest. Many of them pursue occupations which are humble but honourable.

7. (1960) 3 SCR 499 : AIR 1960 SC 932 : (1961) 1 SCJ 98

*Ed.: A similar argument was used to deny gambling the status of trade under Article 19(1)(g) in *State of Bombay v. R.M.D.C.*, 1957 SCR 874 : AIR 1957 SC 699

35. Turning to the factual situation, how far is it true to say that if the petitioners are evicted from their slum and pavement dwellings, they will be deprived of their means of livelihood? It is impossible, in the very nature of things, to gather reliable data on this subject in regard to each individual petitioner and, none has been furnished to us in that form. That the eviction of a person from a pavement or slum will inevitably lead to the deprivation of his means of livelihood, is a proposition which does not have to be established in each individual case. That is an inference which can be drawn from acceptable data. Issues of general public importance, which affect the lives of large sections of the society, defy a just determination if their consideration is limited to the evidence pertaining to specific individuals. In the resolution of such issues, there are no symbolic samples which can effectively project a true picture of the grim realities of life. The writ petitions before us undoubtedly involve a question relating to dwelling houses but, they cannot be equated with a suit for the possession of a house by one private person against another. In a case of the latter kind, evidence has to be led to establish the cause of action and justify the claim. In a matter like the one before us, in which the future of half of the city's population is at stake, the Court must consult authentic empirical data compiled by agencies, official and non-official. It is by that process that the core of the problem can be reached and a satisfactory solution found. It would be unrealistic on our part to reject the petitions on the ground that the petitioners have not adduced evidence to show that they will be rendered jobless if they are evicted from the slums and pavements. Common sense, which is a cluster of life's experiences, is often more dependable than the rival facts presented by warring litigants. -

36. It is clear from the various expert studies to which we have referred while setting out the substance of the pleadings that, one of the main reasons of the emergence and growth of squatter-settlements in big metropolitan cities like Bombay, is the availability of job opportunities which are lacking in the rural sector. The undisputed fact that even after eviction, the squatters return to the cities affords proof of that position. The Planning Commission's publication, *The Report of the Expert Group of Programmes for the Alleviation of Poverty* (1982) shows that half of the population in India lives below the poverty line, a large part of which lives in villages. A publication of the Government of Maharashtra, *Budget and the New 20-Point Socio-Economic Programme* shows that about 45 lacs of families in rural areas live below the poverty line and that, the average agricultural holding of a farmer, which is 0.4 hectares, is hardly enough to sustain him and his comparatively large family. The landless labourers, who constitute the bulk of the village population, are deeply

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imbedded in the mire of poverty. It is due to these economic pressures that the rural population is forced to migrate to urban areas in search of employment. The affluent and the not-so-affluent are alike in search of domestic servants. Industrial and Business Houses pay a fair wage to the skilled workman that a villager becomes in course of time. Having found a job, even if it means washing the pots and pans, the migrant sticks to the big city. If driven out, he returns in quest of another job. The cost of public sector housing is beyond his modest means and the less we refer to the deals of private builders the better for all, excluding none. Added to these factors is the stark reality of growing insecurity in villages on account of the tyranny of parochialism and casteism. The announcement made by the Maharashtra Chief Minister regarding the deportation of willing pavement dwellers affords some indication that they are migrants from the interior areas, within and outside Maharashtra. It is estimated that about 200 to 300 people enter Bombay every day in search of employment. These facts constitute empirical evidence to justify the conclusion that persons in the position of petitioners live in slums and on pavements because they have small jobs to nurse in the city and there is nowhere else to live. Evidently, they choose a pavement or a slum in the vicinity of their place of work, the time otherwise taken in commuting and its cost being forbidding for their slender means. To lose the pavement or the slum is to lose the job. The conclusion, therefore, in terms of the constitutional phraseology is that the eviction of the petitioners will lead to deprivation of their livelihood and consequently to the deprivation of life.

37. Two conclusions emerge from this discussion : one, that the right to life which is conferred by Article 21 includes the right to livelihood and two, that it is established that if the petitioners are evicted from their dwellings, they will be deprived of their livelihood. But the Constitution does not put an absolute embargo on the deprivation of life or personal liberty. By Article 21, such deprivation has to be according to procedure established by law. In the instant case, the law which allows the deprivation of the right conferred by Article 21 is the Bombay Municipal Corporation Act, 1888, the relevant provisions of which are contained in Sections 312(1), 313(1)(a) and 314. These sections which occur in Chapter XI entitled 'Regulation of Streets' read thus :

Section 312. *Prohibition of structures or fixtures which cause obstruction in streets.*—(1) No person shall, except with the permission of the Commissioner under Section 310 or 317, erect or set up any wall, fence, rail, post, step, booth or other structure or fixture in or upon any street or upon or over any open channel, drain, well or tank in any street so as to form

an obstruction to, or an encroachment upon, or a projection over, or to occupy, any portion or such street, channel, drain, well or tank.

Section 313. *Prohibition of deposit, etc., of things in streets.*—(1) No person shall, except with the written permission of the Commissioner,—

- (a) place or deposit upon any street or upon any open channel, drain or well in any streets (or in any public place) any stall, chair, bench, box, ladder, bale or other thing so as to form an obstruction thereto or encroachment thereon.

Section 314. *Power to remove without notice anything erected, deposited or hawked in contravention of Section 312, 313 or 313-A.*—The Commissioner may, without notice, cause to be removed —

- (a) any wall, fence, rail, post, step, booth or other structure or fixture which shall be erected or set up in or upon any street, or upon or over any open channel, drain, well or tank contrary to the provisions of sub-section (1) of Section 312, after the same comes into force in the city or in the suburbs, after the date of the coming into force of the Bombay Municipal (Extension of Limits) Act, 1950 or in the extended suburbs after the date of the coming into force of the Bombay Municipal Further Extension of Limits and Schedule BBA (Amendment) Act, 1956 ;
- (b) any stall, chair, bench, box, ladder, bale, board or shelf, or any other thing whatever placed, deposited, projected, attached, or suspended in, upon, from or to any place in contravention of sub-section (1) of Section 313 ;
- (c) any article whatsoever hawked or exposed for sale in any public place or in any public street in contravention of the provisions of Section 313-A and any vehicle, package, box, board, shelf or any other thing in or on which such article is placed or kept for the purpose of sale.

By Section 3(w), "street" includes a causeway, footway, passage etc., over which the public have a right of passage or access.

38. These provisions, which are clear and specific, empower the Municipal Commissioner to cause to be removed encroachments on footpaths or pavements over which the public have a right of passage or access. It is undeniable that, in these cases, wherever constructions

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have been put up on the pavements, the public have a right of passage or access over those pavements. The argument of the petitioners is that the procedure prescribed by Section 314 for the removal of encroachments from pavements is arbitrary and unreasonable since, not only does it not provide for the giving of a notice before the removal of an encroachment but, it provides expressly that the Municipal Commissioner may cause the encroachment to be removed "without notice".

39. It is far too well-settled to admit of any argument that the procedure prescribed by law for the deprivation of the right conferred by Article 21 must be fair, just and reasonable. [See *E.P. Royappa v. State of T.N.*⁸; *Maneka Gandhi v. Union of India*⁹; *M.H. Hoscot v. State of Maharashtra*¹⁰; *Sunil Batra (I) v. Delhi Administration*¹¹; *Sita Ram v. State of U.P.*¹²; *Hussainara Khatoon (IV) v. Home Secretary, State of Bihar*¹³; *Hussainara Khatoon (I) v. Home Secretary, State of Bihar*¹⁴; *Sunil Batra (II) v. Delhi Administration*¹⁵; *Jolly George Varghese v. Bank of Cochin*¹⁶; *Kasturi Lal Lakshmi Reddy v. State of J & K*¹⁷ and *Francis Coralie Mullin v. Administrator, Union Territory of Delhi*¹⁸.]

40. Just as a mala fide act has no existence in the eye of law, even so, unreasonableness vitiates law and procedure alike. It is therefore essential that the procedure prescribed by law for depriving a person of his fundamental right, in this case the right to life, must conform to the norms of justice and fairplay. Procedure, which is unjust or unfair in the circumstances of a case, attracts the vice of unreasonableness, thereby vitiating the law which prescribes that procedure and consequently, the action taken under it. Any action taken by a public authority which is invested with statutory powers has, therefore, to be tested by the application of two standards: The action must be within the scope of the authority conferred by law and secondly, it must be reasonable. If any action, within the scope of the authority conferred by law, is found to be unreasonable, it must mean that the procedure established by law under which that action is taken is itself unreasonable. The substance of the law cannot be divorced from

8. (1974) 2 SCR 348 : (1974) 4 SCC 3 : 1974 SCC (L&S) 165
9. (1978) 2 SCR 621 : (1978) 1 SCC 248
10. (1979) 1 SCR 192 : (1978) 3 SCC 544 : 1978 SCC (Cri) 468
11. (1979) 1 SCR 392 : (1978) 4 SCC 494 : 1979 SCC (Cri) 155
12. (1979) 2 SCR 1085 : (1979) 2 SCC 656 : 1979 SCC (Cri) 576
13. (1979) 3 SCR 532, 537 : (1980) 1 SCC 98, 103 : 1980 SCC (Cri) 40
14. (1980) 1 SCC 81 : 1980 SCC (Cri) 23
15. (1980) 2 SCR 557 : (1980) 3 SCC 488 : 1980 SCC (Cri) 777
16. (1980) 2 SCR 913, 921-922 : (1980) 2 SCC 360, 367 : AIR 1980 SC 470
17. (1980) 3 SCR 1338, 1356 : (1980) 4 SCC 1
18. (1981) 2 SCR 516, 523-524 : (1981) 1 SCC 608, 614 : 1981 SCC (Cri) 212

the procedure which it prescribes for, how reasonable the law is, depends upon how fair is the procedure prescribed by it. Sir Raymond Evershed¹⁹ says that, "from the point of view of the ordinary citizen, it is the procedure that will most strongly weigh with him. He will tend to form his judgment of the excellence or otherwise of the legal system from his personal knowledge and experience in seeing the legal machine at work". Therefore, "He that takes the procedural sword shall perish with the sword"²⁰.

41. Justice K.K. Mathew points out in his article on '*The Welfare State, Rule of Law and Natural Justice*', which is to be found in his book *Democracy, Equality and Freedom*[†], that there is "substantial agreement in juristic thought that the great purpose of the rule of law notion is the protection of the individual against arbitrary exercise of power wherever it is found". Adopting that formulation, Bhagwati, J. speaking for the Court, observed in *Ramana Dayaram Shetty v. International Airport Authority of India*²¹, that it is (SCC p. 504, para 10) "unthinkable that in a democracy governed by the rule of law, the executive Government or any of its officers should possess arbitrary power over the interests of the individual. Every action of the executive Government must be informed with reason and should be free from arbitrariness. That is the very essence of the rule of law and its bare minimal requirement".

42. Having given our anxious and solicitous consideration to this question, we are of the opinion that the procedure prescribed by Section 314 of the Bombay Municipal Corporation Act for removal of encroachments on the footpaths or pavements over which the public has the right of passage or access, cannot be regarded as unreasonable, unfair or unjust. There is no static measure of reasonableness which can be applied to all situations alike. Indeed, the question "Is this procedure reasonable?" implies and postulates the inquiry as to whether the procedure prescribed is reasonable in the circumstances of the case. In *Francis Coralie Mullin*¹⁸, Bhagwati, J., said at p. 524: (SCC p. 615, para 4)

... it is for the Court to decide in the exercise of its constitutional power of judicial review whether the deprivation of life or personal liberty in a given case is by procedure, which is reasonable, fair and just or it is otherwise. (emphasis supplied)

19. 'The Influence of Remedies on Rights' (Current Legal Problems 1953, Volume 6)

20. Per Frankfurter, J. in *Viteralli v. Seion*, 3 L. Ed 2d 1012

[†]Eastern Book Co., Lucknow (1978) p. 28

21. (1979) 3 SCR 1014. 1032: (1979) 3 SCC 489. 504

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43. In the first place, footpaths or pavements are public properties which are intended to serve the convenience of the general public. They are not laid for private use and indeed, their use for a private purpose frustrates the very object for which they are carved out from portions of public streets. The main reason for laying out pavements is to ensure that the pedestrians are able to go about their daily affairs with a reasonable measure of safety and security. That facility, which has matured into a right of the pedestrians, cannot be set at naught by allowing encroachments to be made on the pavements. There is no substance in the argument advanced on behalf of the petitioners that the claim of the pavement dwellers to put up constructions on pavements and that of the pedestrians to make use of the pavements for passing and repassing, are competing claims and that, the former should be preferred to the latter. No one has the right to make use of a public property for a private purpose without the requisite authorisation and, therefore, it is erroneous to contend that the pavement dwellers have the right to encroach upon pavements by constructing dwellings thereon. Public streets, of which pavements form a part, are primarily dedicated for the purpose of passage and, even the pedestrians have but the limited right of using pavements for the purpose of passing and repassing. So long as a person does not transgress the limited purpose for which pavements are made, his use thereof is legitimate and lawful. But, if a person puts any public property to a use for which it is not intended and is not authorised so to use it, he becomes a trespasser. The common example which is cited in some of the English cases (see, for example, *Hickman v. Maisey*²²) is that if a person, while using a highway for passage, sits down for a time to rest himself by the side of the road, he does not commit a trespass. But, if a person puts up a dwelling on the pavement, whatever may be the economic compulsions behind such an act, his user of the pavement would become unauthorised. As stated in *Hickman*²² it is not easy to draw an exact line between the legitimate user of a highway as a highway and the user which goes beyond the right conferred upon the public by its dedication. But, as in many other cases, it is not difficult to put cases well on one side of the line. Putting up a dwelling on the pavement is a case which is clearly on one side of the line showing that it is an act of trespass. Section 61 of the Bombay Municipal Corporation Act lays down the obligatory duties of the Corporation, under clause (d) of which, it is its duty to take measures for abatement of all nuisances. The existence of dwellings on the pavements is unquestionably a source of nuisance to the public, at least for the reason that they are denied the use of pavements for passing and repassing. They are compelled, by reason

22. (1900) 1 QB 752; 1900 WN 72 (CA)

of the occupation of pavements by dwellers, to use highways and public streets as passages. The affidavit filed on behalf of the Corporation shows that the fall-out of pedestrians in large numbers on highways and streets constitutes a grave traffic hazard. Surely, pedestrians deserve consideration in the matter of their physical safety, which cannot be sacrificed in order to accommodate persons who use public properties for a private purpose, unauthorizedly. Under clause (o) of Section 61 of the B.M.C. Act, the Corporation is under an obligation to remove obstructions upon public streets and other public places. The counter-affidavit of the Corporation shows that the existence of hutments on pavements is a serious impediment in repairing the roads, pavements, drains and streets. Section 63(k), which is discretionary, empowers the Corporation to take measures to promote public safety, health or convenience not specifically provided otherwise. Since it is not possible to provide any public conveniences to the pavement dwellers on or near the pavements, they answer the nature's call on the pavements or on the streets adjoining them. These facts provide the background to the provision for removal of encroachments on pavements and footpaths.

44. The challenge of the petitioners to the validity of the relevant provisions of the Bombay Municipal Corporation Act is directed principally at the procedure prescribed by Section 314 of that Act, which provides by clause (a) that the Commissioner may, *without notice*, take steps for the removal of encroachments in or upon any street, channel, drains, etc. By reason of Section 3(w), 'street' includes a causeway, footway or passage. In order to decide whether the procedure prescribed by Section 314 is fair and reasonable, we must first determine the true meaning of that section because, the meaning of the law determines its legality. If a law is found to direct the doing of an act which is forbidden by the Constitution or to compel, in the performance of an act, the adoption of a procedure which is impermissible under the Constitution, it would have to be struck down. Considered in its proper perspective, Section 314 is in the nature of an enabling provision and not of a compulsive character. It enables the Commissioner, in appropriate cases, to dispense with previous notice to persons who are likely to be affected by the proposed action. It does not require and, cannot be read to mean that, in total disregard of the relevant circumstances pertaining to a given situation, the Commissioner must cause the removal of an encroachment without issuing previous notice. The primary rule of construction is that the language of the law must receive its plain and natural meaning. What Section 314 provides is that the Commissioner *may*, without notice, cause an encroachment to be removed. It does not command that the Commissioner shall without notice cause an encroachment to be removed.

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Putting it differently, Section 314 confers on the Commissioner the discretion to cause an encroachment to be removed with or without notice. That discretion has to be exercised in a reasonable manner so as to comply with the constitutional mandate that the procedure accompanying the performance of a public act must be fair and reasonable. We must lean in favour of this interpretation because it helps sustain the validity of the law. Reading Section 314 as containing a command not to issue notice before the removal of an encroachment will make the law invalid.

45. It must further be presumed that, while vesting in the Commissioner the power to act without notice, the Legislature intended that the power should be exercised sparingly and in cases of urgency which brook no delay. In all other cases, no departure from the audi alteram partem rule ('Hear the other side') could be presumed to have been intended. Section 314 is so designed as to exclude the principles of natural justice by way of exception and not as a general rule. There are situations which demand the exclusion of the rules of natural justice by reason of diverse factors like time, place, the apprehended danger and so on. The ordinary rule which regulates all procedure is that persons who are likely to be affected by the proposed action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.

46. It was urged by Shri K.K. Singhvi on behalf of the Municipal Corporation that the Legislature may well have intended that no notice need be given in any case whatsoever because, no useful purpose could be served by issuing a notice as to why an encroachment on a public property should not be removed. We have indicated above that far from so intending, the Legislature has left it to the discretion of the Commissioner whether or not to give notice, a discretion which has to be exercised reasonably. Counsel attempted to demonstrate the practical futility of issuing the show cause notice by pointing out firstly, that the only answer which a pavement dweller, for example, can make to such a notice is that he is compelled to live on the pavement because he has no other place to go to and secondly, that it is hardly likely that in pursuance of such a notice, pavement dwellers or slum dwellers would ask for time to vacate since, on their own showing, they are compelled to occupy some pavement or slum or the other if they are evicted. It may be true to say that, in the generality of cases, persons who have committed encroachments on pavement or

on other public properties may not have an effective answer to give. It is a notorious fact of contemporary life in metropolitan cities, that no person in his senses would opt to live on a pavement or in a slum, if any other choice were available to him. Anyone who cares to have even a fleeting glance at the pavement or slum dwellings will see that they are the very hell on earth. But, though this is so, the contention of the Corporation that no notice need be given because, there can be no effective answer to it, betrays a misunderstanding of the rule of hearing, which is an important element of the principles of natural justice. The decision to dispense with notice cannot be founded upon a presumed impregnability of the proposed action. For example, in the common run of cases, a person may contend in answer to a notice under Section 314 that (i) there was, in fact, no encroachment on any public road, footpath or pavement, or (ii) the encroachment was so slight and negligible as to cause no nuisance or inconvenience to other members of the public, or (iii) time may be granted for removal of the encroachment in view of humane considerations arising out of personal, seasonal or other factors. It would not be right to assume that the Commissioner would reject these or similar other considerations without a careful application of mind. Human compassion must soften the rough edges of justice in all situations. The eviction of the pavement or slum dweller not only means his removal from the house but the destruction of the house itself. And the destruction of a dwelling house is the end of all that one holds dear in life. Humbler the dwelling, greater the suffering and more intense the sense of loss.

47. The proposition that notice need not be given of a proposed action because, there can possibly be no answer to it, is contrary to the well-recognised understanding of the real import of the rule of hearing. That proposition overlooks that justice must not only be done but must manifestly be seen to be done and confuses one for the other. The appearance of injustice is the denial of justice. It is the dialogue with the person likely to be affected by the proposed action which meets the requirement that justice must also be seen to be done. Procedural safeguards have their historical origins in the notion that conditions of personal freedom can be preserved only when there is some institutional check on arbitrary action on the part of public authorities²³. The right to be heard has two facets, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the pro-

23. Kadish, 'Methodology and Criteria in Due Process Adjudication — A Survey and Criticism', 66 Yale LJ 319, 340 (1957)

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cesses by which those decisions are made, an opportunity that expresses their dignity as persons²⁴.

Whatever its outcome, such a hearing represents a valued human interaction in which the affected person experiences at least the satisfaction of participating in the decision that vitally concerns her, and perhaps the separate satisfaction of receiving an explanation of why the decision is being made in a certain way. Both the right to be heard from, and the right to be told why, are analytically distinct from the right to secure a different outcome; these rights to interchange express the elementary idea that to be a *person*, rather than a *thing*, is at least to be consulted about what is done with one. Justice Frankfurter captured part of this sense of procedural justice when he wrote that the "validity and moral authority of a conclusion largely depend on the mode by which it was reached. . . . No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done"²⁵. At stake here is not just the much-acclaimed *appearance* of justice but, from a perspective that treats process as intrinsically significant, the very *essence* of justice²⁶.

The instrumental facet of the right of hearing consists in the means which it affords of assuring that the public rules of conduct, which result in benefits and prejudices alike, are in fact accurately and consistently followed.

It ensures that a challenged action accurately reflects the substantive rules applicable to such action; its point is less to assure *participation* than to use participation to assure *accuracy*²⁷.

48. Any discussion of this topic would be incomplete without reference to an important decision of this Court in *S.L. Kapoor v. Jagmohan*²⁸. In that case, the supersession of the New Delhi Municipal Committee was challenged on the ground that it was in violation of the principles of natural justice since, no show cause notice was issued before the order of supersession was passed. Linked with that question was the question whether the failure to observe the principles of natural justice matters at all, if such observance would have made no difference.

24. *Goldberg v. Kelly*, 397 US 254, 264-65 (1970) (right of the poor to participate in public processes).

25. *Joint Anti-fascist Refugee Committee v. McGrath*, 341 US 123, 171-72 (1951).

26. See 'American Constitutional Law' by Laurence H. Tribe, Professor of Law, Harvard University (1978 Edn., p. 503).

27. *Id.*

28. (1981) 1 SCR 746, 766; (1980) 4 SCC 379, 395

the admitted or indisputable facts speaking for themselves. After referring to the decisions in *Ridge v. Baldwin*²⁹; *John v. Rees*³⁰; *Annamunthodo v. Oilfields Workers' Trade Union*³¹; *Margarita Fuentes et al v. Tobert L. Shevin*³²; *Chintapalli Agency Taluk Arrack Sales Cooperative Society Ltd. v. Secretary (Food and Agriculture) Government of A.P.*³³ and to an interesting discussion of the subject in *Jackson's Natural Justice* (1980 Edn.), the Court, speaking through one of us. Chinnappa Reddy, J. said : (SCC p. 395, para 24)

In our view the principles of natural justice know of no exclusionary rule dependent on whether it would have made any difference if natural justice had been observed. The non-observance of natural justice is itself prejudice to any man and proof of prejudice independently of proof of denial of natural justice is unnecessary. It ill comes from a person who has denied justice that the person who has been denied justice is not prejudiced.

These observations sum up the true legal position regarding the purport and implications of the right of hearing.

49. The jurisprudence requiring hearing to be given to those who have encroached on pavements and other public properties evoked a sharp response from the respondents' counsel. "Hearing to be given to trespassers who have encroached on public properties? To persons who commit crime?", they seemed to ask in wonderment. There is no doubt that the petitioners are using pavements and other public properties for an unauthorised purpose. But, their intention or object in doing so is not to "commit an offence or intimidate, insult or annoy any person", which is the gist of the offence of 'Criminal trespass' under Section 441 of the Penal Code. They manage to find a habitat in places which are mostly filthy or marshy, out of sheer helplessness. It is not as if they have a free choice to exercise as to whether to commit an encroachment and if so, where. The encroachments committed by these persons are involuntary acts in the sense that those acts are compelled by inevitable circumstances and are not guided by choice. Trespass is a tort³⁴. But, even the law of Torts requires that though a trespasser may be evicted forcibly, the force used must be no greater than what is reasonable and appropriate to the occasion and, what is even more important, the trespasser should be asked and given a reasonable opportunity to depart before force is used to expel him.

29. (1964) AC 40, 68 : (1963) 2 All ER 66, 73

30. (1970) 1 Ch 345, 402

31. (1961) 3 All ER 621, 625 (HL)

32. 32 L Ed 2d 556, 574

33. (1978) 1 SCR 563, 567, 569-70 : (1977) 4 SCC 337, 341, 343-44

34. See Ramaswamy Iyer's 'Law of Torts' 7th Edn., by Justice and Mrs S.K. Desai, p. 98, para 41

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Besides, under the law of Torts, necessity is a plausible defence, which enables a person to escape liability on the ground that the acts complained of are necessary to prevent greater damage, *inter alia*, to himself. "Here, as elsewhere in the law of Torts, a balance has to be struck between competing sets of values..."³⁶

50. The charge made by the State Government in its affidavit that slum and pavement dwellers exhibit especial criminal tendencies is unfounded. According to Dr P.K. Muttagi, Head of the unit for urban studies of the Tata Institute of Social Sciences, Bombay, the surveys carried out in 1972, 1977, 1979 and 1981 show that many families which have chosen the Bombay footpaths just for survival, have been living there for several years and that 53% of the pavement dwellers are self-employed as hawkers in vegetables, flowers, ice-cream, toys, balloons, buttons, needles and so on. Over 38% are in the wage-employed category as casual labourers, construction workers, domestic servants and luggage carriers. Only 1.7% of the total number is generally unemployed. Dr Muttagi found among the pavement dwellers a graduate of Marathwada University and a Muslim poet of some standing. "These people have merged with the landscape, become part of it, like the chameleon", though their contact with their more fortunate neighbours who live in adjoining high-rise buildings is casual. The most important finding of Dr Muttagi is that the pavement dwellers are a peaceful lot, "for, they stand to lose their shelter on the pavement if they disturb the affluent or indulge in fights with their fellow dwellers". The charge of the State Government, besides being contrary to these scientific findings, is born of prejudice against the poor and the destitute. Affluent people living in sky scrapers also commit crimes varying from living on the gains of prostitution and defrauding the public treasury to smuggling. But, they get away. The pavement dwellers, when caught, defend themselves by asking, "Who does not commit crimes in this city?" As observed by Anand Chakravarti, "The separation between existential realities and the rhetoric of socialism indulged in by the wielders of power in the government cannot be more profound"³⁵.

51. Normally, we would have directed the Municipal Commissioner to afford an opportunity to the petitioners to show why the encroachments committed by them on pavements or footpaths should not be removed. But, the opportunity which was denied by the Commissioner was granted by us in an ample measure, both sides having

35. See Salmond and Heuston, 'Law of Torts', 18th Edn., Ch. 21, p. 463, Article 185 — 'Necessity'

36. 'Some aspects of inequality in rural India: A Sociological Perspective' published in 'Equality and Inequality, Theory and Practice' edited by Andre Beteille, 1983

made their contentions elaborately on facts as well as on law. Having considered those contentions, we are of the opinion that the Commissioner was justified in directing the removal of the encroachments committed by the petitioners on pavements, footpaths or accessory roads. As observed in *S.L. Kapoor*²⁸, "...where on the admitted or indisputable facts only one conclusion is possible and under the law only one penalty is permissible, the court may not issue its writ to compel the observance of natural justice, not because it is not necessary to observe natural justice but because courts do not issue futile writs". Indeed, in that case, the Court did not set aside the order of supersession in view of the factual position stated by it. But, though we do not see any justification for asking the Commissioner to hear the petitioners, we propose to pass an order which, we believe, he would or should have passed, had he granted a hearing to them and heard what we did. We are of the opinion that the petitioners should not be evicted from the pavements, footpaths or accessory roads until one month after the conclusion of the current monsoon season, that is to say, until October 31, 1985. In the meanwhile, as explained later, steps may be taken to offer alternative pitches to the pavement dwellers who were or who happened to be censused in 1976. The offer of alternative pitches to such pavement dwellers should be made good in the spirit in which it was made, though we do not propose to make it a condition precedent to the removal of the encroachments committed by them.

52. Insofar as the Kamraj Nagar Basti is concerned, there are over 400 hutments therein. The affidavit of the Municipal Commissioner, Shri D.M. Sukthankar, shows that the Basti was constructed on an accessory road, leading to the highway. It is also clear from that affidavit that the hutments were never regularised and no registration numbers were assigned to them by the Road Development Department. Since the Basti is situated on a part of the road leading to the Express Highway, serious traffic hazards arise on account of the straying of the Basti children on to the Express Highway, on which there is heavy vehicular traffic. The same criterion would apply to the Kamraj Nagar Basti as would apply to the dwellings constructed unauthorisedly on other roads and pavements in the city.

53. The affidavit of Shri Arvind V. Gokak, Administrator of the Maharashtra Housing and Areas Development Authority, Bombay, shows that the State Government had taken a decision to compile a list of slums which were required to be removed in public interest and to allocate, after a spot inspection, 500 acres of vacant land in or near the Bombay Suburban District for resettlement of hutment dwellers removed from the slums. A census was accordingly carried

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out on January 4, 1976 to enumerate the slum dwellers spread over about 850 colonies all over Bombay. About 67% of the hutment dwellers produced photographs of the heads of their families, on the basis of which the hutments were numbered and their occupants were given identity cards. Shri Gokak further says in his affidavit that the Government had also decided that the slums which were in existence for a long time and which were improved and developed, would not normally be demolished unless the land was required for a public purpose. In the event that the land was so required, the policy of the State Government was to provide alternate accommodation to the slum dwellers who were censused and possessed identity cards. The circular of the State Government dated February 4, 1976 (No. SIS/176/D-41) bears out this position. In the enumeration of the hutment dwellers, some persons occupying pavements also happened to be given census cards. The Government decided to allot pitches to such persons at a place near Malavani. These assurances held forth by the Government must be made good. In other words, despite the finding recorded by us that the provision contained in Section 314 of the B.M.C. Act is valid, pavement dwellers to whom census cards were given in 1976 must be given alternate pitches at Malavani though not as a condition precedent to the removal of encroachments committed by them. Secondly, slum dwellers who were censused and were given identity cards must be provided with alternate accommodation before they are evicted. There is a controversy between the petitioners and the State Government as to the extent of vacant land which is available for resettlement of the inhabitants of pavements and slums. Whatever that may be, the highest priority must be accorded by the State Government to the resettlement of these unfortunate persons by allotting to them such land as the Government finds to be conveniently available. The Maharashtra Employment Guarantee Act, 1977, the Employment Guarantee Scheme, the 'New Twenty Point Socio-Economic Programme, 1982', the 'Affordable Low Income Shelter Programme in Bombay Metropolitan Region' and the 'Programme of House Building for the Economically Weaker Sections' must not remain a dead letter as such schemes and programmes often do. Not only that, but more and more such programmes must be initiated if the theory of equal protection of laws has to take its rightful place in the struggle for equality. In these matters, the demand is not so much for less governmental interference as for positive governmental action to provide equal treatment to neglected segments of society. The profound rhetoric of socialism must be translated into practice for, the problems which confront the State are problems of human destiny.

54. During the course of arguments, an affidavit was filed by Shri S.K. Jahagirdar, Under-Secretary in the Department of Housing,

Government of Maharashtra, setting out the various housing schemes which are under the consideration of the State Government. The affidavit contains useful information on various aspects relating to slum and pavement dwellers. The census of 1976 which is referred to in that affidavit shows that 28.18 lacs of people were living in 6,27,404 households spread over 1680 slum pockets. The earning of 80% of the slum households did not exceed Rs 600 per month. The State Government has a proposal to undertake 'Low Income Scheme Shelter Programme' with the aid of the World Bank. Under that scheme, 85,000 small plots for construction of houses would become available, out of which 40,000 would be in Greater Bombay, 25,000 in the Thane-Kalyan area and 20,000 in the New Bombay region. The State Government is also proposing to undertake 'Slum Upgradation Programme (SUP)' under which basic civic amenities would be made available to the slum dwellers. We trust that these schemes, grandiose as they appear, will be pursued faithfully and the aid obtained from the World Bank utilised systematically and effectively for achieving its purpose.

55. There is no short term or marginal solution to the question of squatter colonies, nor are such colonies unique to the cities of India. Every country, during its historical evolution, has faced the problem of squatter settlements and most countries of the under-developed world face this problem today. Even the highly developed affluent societies face the same problem, though with their larger resources and smaller populations, their task is far less difficult. The forcible eviction of squatters, even if they are resettled in other sites, totally disrupts the economic life of the household. It has been a common experience of the administrators and planners that when resettlement is forcibly done, squatters eventually sell their new plots and return to their original sites near their place of employment. Therefore, what is of crucial importance to the question of thinning out the squatters' colonies in metropolitan cities is to create new opportunities for employment in the rural sector and to spread the existing job opportunities evenly in urban areas. Apart from the further misery and degradation which it involves, eviction of slum and pavement dwellers is an ineffective remedy for decongesting the cities. In a highly readable and moving account of the problems which the poor have to face, Susan George says³⁷ :

So long as thoroughgoing land reform, re-grouping and distribution of resources to the poorest, bottom half of the population does not take place, Third World countries can go on

37. 'How the Other Half Dies — The Real Reasons for World Hunger' (Pelican books)

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increasing their production until hell freezes and hunger will remain, for the production will go to those who already have plenty — to the developed world or to the wealthy in the Third World itself. Poverty and hunger walk hand in hand. (p. 18)

56. We will close with a quotation from the same book which has a message :

Malnourished babies, wasted mothers, emaciated corpses in the streets of Asia have definite and definable reasons for existing. Hunger may have been the human race's constant companion, and 'the poor may always be with us', but in the twentieth century, one cannot take this fatalistic view of the destiny of millions of fellow creatures. Their condition is not inevitable but is caused by identifiable forces within the province of rational human control. (p. 15)

57. To summarise, we hold that no person has the right to encroach, by erecting a structure or otherwise, on footpaths, pavements or any other place reserved or earmarked for a public purpose like, for example, a garden or a playground ; that the provision contained in Section 314 of the Bombay Municipal Corporation Act is not unreasonable in the circumstances of the case ; and that, the Kamraj Nagar Basti is situated on an accessory road leading to the Western Express Highway. We have referred to the assurances given by the State Government in its pleadings here which, we repeat, must be made good. Stated briefly, pavement dwellers who were censused or who happened to be censused in 1976 should be given, though not as a condition precedent to their removal, alternate pitches at Malavani or, at such other convenient place as the Government considers reasonable but not farther away in terms of distance ; slum dwellers who were given identity cards and whose dwellings were numbered in the 1976 census must be given alternate sites for their resettlement ; slums which have been in existence for a long time, say for twenty years or more, and which have been improved and developed will not be removed unless the land on which they stand or the appurtenant land, is required for a public purpose, in which case, alternate sites or accommodation will be provided to them ; the 'Low Income Scheme Shelter Programme' which is proposed to be undertaken with the aid of the World Bank will be pursued earnestly ; and, the 'Slum Upgradation Programme (SUP)' under which basic amenities are to be given to slum dwellers will be implemented without delay. In order to minimise the hardship involved in any eviction, we direct that the slums, wherever situated, will not be removed until one month after the end of the current monsoon season, that is, until October 31, 1985 and, thereafter, only in accordance with this judgment. If any slum

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is required to be removed before that date, parties may apply to this Court. Pavement dwellers, whether censused or uncensused, will not be removed until the same date viz. October 31, 1985.

58. The writ petitions will stand disposed of accordingly. There will be no order as to costs.

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(BEFORE V. BALAKRISHNA ERADI AND SABYASACHI MUKHARJI, JJ.)

SAKURU

.. Appellant ;

Versus

TANAJI

.. Respondent.

Civil Appeal No. 1852 of 1979†,
decided on July 10, 1985

Limitation — A.P. (Telangana Area) Tenancy and Agricultural Lands Act, 1950 (21 of 1950) — Sections 93 [as it stood prior to A.P. Tenancy Laws Amendment Act, 1979 (2 of 1979)] and 90 — Delay in filing appeal before Collector under Section 90 beyond the period prescribed under Section 93, held, not condonable under Section 5 of Limitation Act, 1963

Limitation Act, 1963 — Section 5 — Applicability — Where appeal is before a body or an authority other than a 'court', special statute under which appeal is filed must authorise such body or authority to apply Section 5 while dealing with application for condonation of delay in filing the appeal

Statute Law — Amendment — Whether clarificatory — Where language of the pre-amended provision is clear and unambiguous, amendment not clarificatory

Held :

The provisions of the Limitation Act, 1963 apply only to proceedings in 'courts' and not to appeals or applications before bodies other than courts such as quasi-judicial tribunals or executive authorities, notwithstanding the fact that such bodies or authorities may be vested with certain specified powers conferred on courts under the Codes of Civil or Criminal Procedure. Even in cases where appeals are filed before such bodies the relevant statute may contain an express provision conferring on the appellate authority the power to extend the prescribed period of limitation on sufficient cause being shown by laying down that the provisions of Section 5 of the Limitation Act shall be applicable to such proceedings. (Para 3)

In the present case the Collector before whom the appeal was preferred under Section 90 of the A.P. Act not being a court, the Limitation Act as such had no applicability to the proceedings before him. Section 93 of that Act (as it stood prior to amendment Act 2 of 1979) which prescribes the period of limitation for filing appeal only makes applicable to the proceedings before

†From the Judgment and Order dated April 12, 1978 of the Andhra Pradesh High Court in Civil Revision Petition No. 3289 of 1977

the recommendation of the Administrative Committee or of the Full Court is void and ineffective. We, therefore, set aside the judgment of the High Court and quash the order of premature retirement passed in respect of the appellant. He shall be treated as having been in service until the expiry of March 31, 1971 when he would have retired from service on attaining 58 years of age.

15. We are informed that the appellant has died on November 27, 1983 and his legal representatives have been brought on record. The arrears of salary, pension etc. payable to the appellant on the above basis till November 27, 1983 shall therefore, be paid to the legal representatives of the appellant within four months from today. This appeal is accordingly allowed. The legal representatives of the appellant are also entitled to the costs in both the courts.

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(BEFORE O. CHINNAPPA REDDY AND M.M. DUTT, JJ.)

BIJOE EMMANUEL AND OTHERS .. Appellants;
Versus
STATE OF KERALA AND OTHERS .. Respondents.

Civil Appeal No. 870 of 1986†, decided on August 11, 1986

Constitution of India — Articles 25(1) and 19(1)(a) — Freedom of conscience — School children faithful to Jehovah's Witnesses refusing to sing National Anthem though respectfully standing for it — Objection based on sincere, well established and universally recognised conscientious religious belief — Absence of any perversity or unpatriotic sentiments — Expulsion from school based on executive instructions in two circulars obligating singing of National Anthem — Held, no disrespect to the National Anthem shown nor violation of any law made out — Fundamental duty under Article 51-A(a) also not violated — Executive instructions not 'law' justifying the restriction on fundamental rights — Expulsion order in such situation unconstitutional — Prevention of Insults to National Honour Act, 1971 — Kerala Education Act and Rules, Chapter VIII, Rule 8 and Chapter IX, Rule 6

Constitution of India — Article 25 — Religious denomination or sect can also claim rights under

Constitution of India — Part III — The negative of a fundamental right is also protected — Right to remain silent upheld under the right to free speech and expression under Article 19(1)(a)

Constitution of India — Article 19(2) to (6) — Reasonable restrictions on the rights under Article 19(1) can only be imposed by a 'law' and not executive or departmental instructions (Para 16)

†From the Judgment and Order dated December 7, 1985 of the Kerala High Court in W.A. No. 483 of 1985

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Constitution of India — Article 25(2) — 'Law' does not include mere executive or departmental instructions (Para 19)

Prevention of Insults to National Honour Act, 1971 — Section 3 — Held not violated by refusal to sing the National Anthem while respectfully standing for it (Para 11)

Administrative Law — Subordinate legislation — Executive instructions — Not being 'law', held, cannot impose restrictions on rights under Article 19(1) or Article 25(1)

Facts:

The three appellant school children are the faithful of Jehovah's Witnesses, a world-wide sect of Christians.

During the morning assembly at school the appellants while respectfully standing during the recitation of the National Anthem, 'Jana Gana Mana', refused to sing it—not on ground of its words or thoughts expressed therein but—on the ground that it is against the tenets of their religious faith. (The appellants' case is that they would continue to stand respectfully for the National Anthem in future as well.) That Jehovah's Witnesses do have several tenets, among them refusal to sing any National Anthem or salute the Flag, has been well established and recognised the world over and upheld by the highest courts in the United States, Australia and Canada and find recognition in authoritative works like Encyclopaedia Britannica.

Circulars issued by the Director of Public Instruction, Kerala obliged school children to sing the National Anthem. Consequently the appellants on instruction of the Deputy Inspector of Schools were expelled from school. Having failed to secure relief through representation they filed a writ petition which was rejected first by a Single Judge and then a Division Bench of the High Court. Allowing the appeal by special leave, the Supreme Court after considering similar cases decided in Australia, the United States and Canada and on the basis of authoritative texts

Held:

(1) That the appellant Jehovah's Witnesses truly and conscientiously believe that their religion does not permit them to join any rituals except it be in their prayers to Jehovah their God, is not in doubt. Though their religious beliefs may appear strange or even bizarre, the sincerity of their beliefs is beyond question. They do not hold their beliefs idly and their conduct is not the outcome of any perversity. The petitioners have not asserted these beliefs for the first time or out of any unpatriotic sentiment. Their objection to sing is not just against the National Anthem of India. They have refused to sing other National Anthems elsewhere. They are law-abiding and well-behaved children who do stand up respectfully and would continue to do so when the National Anthem is sung. Their refusal, while so standing, to join in the singing of the National Anthem is neither disrespectful of it nor inconsistent with the Fundamental Duty under Article 51-A(a). Jehovah's Witnesses have continually sought for their beliefs and tenets the world over and they have been upheld in judicial pronouncements of several countries. Some of these judicial pronouncements have been cited and approved earlier in our Supreme Court, though in a different context. (Paras 3, 10, 8, 2 and 20)

Commr., HRE v. Sri Lakshminidra Thirtha Suamiar of Sri Shirur Mutt, 1954 SCR 1005; AIR 1954 SC 282; *Ratilal Panachand Gandhi v. State of Bombay*, 1954 SCR 1055; AIR 1954

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SC 388, 392; *S.P. Mittal v. Union of India*, (1983) 1 SCC 51; (1983) 1 SCR 729; *Adelaide Company of Jehovah's Witnesses v. The Commonwealth*, 67 CLR 116, *referred to*

West Virginia State Board of Education v. Barnette, 87 Law Ed 1628, 1633: 319 US 624, 629 (1943) and *Donald v. Board of Education for the City Hamilton*, 1915 Ontario Reports 518, *relied on*

Minersville School District v. Gobitis, 84 Law Ed 1375: 310 US 586 (1940), *considered*

Sheldon v. Fannin, 221 F Supp 766 (1953), *distinguished*

(2) In fact, there is no provision of law which obliges anyone to sing the National Anthem. The circulars of September 1961 and February 1970, said to be Code of Conduct for teachers and pupils, issued by the Director of Public Instruction, Kerala obligating the singing of National Anthem, have no statutory basis or legal sanction behind them. They are mere departmental instructions. Also, the circulars do not oblige each and every pupil to join in the singing even if he has any conscientious objection based on his religious faith, nor is any penalty attached to not joining the singing. If the circulars did oblige despite genuine, conscientious religious objection, it would contravene Article 19(1)(a) and Article 25(1). Also, the rights under Article 19(1)(a) can only be restricted by a 'law' having statutory force and not a mere executive or departmental instruction which the two circulars are. In any event, the circulars cannot be justified under any of the grounds in Article 19(2). The two circulars therefore violate Article 19(1)(a).

(Paras 10, 17 and 14 to 17)

Kharak Singh v. State of U.P., (1964) 1 SCR 332; AIR 1963 SC 1295 and *Kameshwar Prasad v. State of Bihar*, 1962 Supp 3 SCR 369; AIR 1962 SC 1166, *followed*

(3) The refusal to sing the National Anthem also did not violate the provisions of Section 3 of the Prevention of Insults to National Honour Act, 1971.

(Para 11)

(4) The impugned action also violates Article 25. While interpreting this article it must be borne in mind that Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution.

(Para 18)

It is the duty and function of the Court whenever the fundamental right under Article 25 is invoked to examine the act and see if it is to protect public order, morality and health, or whether it gives effect to the other provisions of Part III of the Constitution or whether it is authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be associated with religious practice or to provide for social welfare and reform. The purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character.

(Para 19)

Observations of Latham, C.J. in *Adelaide Company of Jehovah's Witnesses v. The Commonwealth*, 67 CLR 116, *approved*

An action validly restricting the right under Article 25 must however be based on a 'law' having statutory force, and not on a mere executive or departmental instruction.

(Para 18)

In deciding whether Article 25 is attracted in a particular situation the question before the Court is not whether a particular religious belief or practice appeals to its reason or sentiment but whether the belief is genuinely

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and conscientiously held as part of the profession or practice of religion. The personal views and reactions of the Court are irrelevant. (Para 20)

Janabhai Ji v. Sonabai, (1909) 33 Bom 122: 10 Bom LR 417, approved

In the present case the expulsion of the appellant children from school for the reason that because of their conscientiously held religious faith, they did not join in the singing of the National Anthem though they stood up respectfully when it was sung, is a violation of their fundamental right under Article 25 "to freedom of conscience and freely to profess, practise and propagate religion". They cannot be denied that right on the ground that the appellants belonged but to a religious denomination and not a separate religion. (Paras 25 and 26)

Acharya Jagdishwarand v. Commissioner of Police, Calcutta, (1983) 4 SCC 522: AIR 1984 SC 51, explained and distinguished

While striking down the expulsion order and directing readmission of the appellants into their school it may be added that our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practises tolerance; let us not dilute it. (Para 27)

Appeal allowed

M/7441/C

Ed. Note.—(1) What seems to have weighed with the Court in this case is that the objections made by the appellants are true, genuine and not motivated or perverted and that such objections have been raised and upheld in other parts of the world as well. That the tenet is universally followed or asserted, is well recognised and established and recorded in authoritative texts then becomes the test for considering a conscientious objection. Therefore a frivolous tenet or a mere fancy or idiosyncrasy lacking such a standing cannot be the basis of a conscientious objection. Necessarily therefore it has to be a case by case evaluation and determination. But it may be wise to follow the dictum that it would be better if matters of conscience are left alone. (Para 1)

What has weighed with the Court is the fact that the appellants were 'well-behaved' and that they *respectfully*, stood up when the National Anthem was sung and *would continue to do so respectfully* in the future (Para 23). Besides that, the objection to sing the National Anthem is just not against the Indian National Anthem but of every other country. The Court also did not find any disrespect in not singing the National Anthem while respectfully standing for it. What if the Jehovah's Witnesses hitherto refuse to stand for the National Anthem as they do elsewhere? (See the quote from Encyclopaedia Britannica in Para 4 above and *Sheldon v. Fannin*.) Would the assertion by the appellants that they would continue to stand respectfully whenever the National Anthem is played bind all the other Jehovah's Witnesses in India? Legally? Morally?

A significant aspect of the matter is that on facts the court found that the conscientious objections did not offend the Fundamental Duty under Article 51-A(a) to respect the National Anthem. A future case may involve a conflict between the objection based on conscience and the Fundamental Duties upon a citizen. In that respect the Constitution of India differs distinctly from the U.S. Constitution. Can a member of the Jehovah's Witnesses refuse to take the Form of Oath or Affirmation prescribed in the Third Schedule to the Constitution if required to do so?

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(2) The Court has once again recognised the negative of a fundamental right as also a fundamental right. The petition has been allowed on ground of violation of Article 19(1)(a) which guarantees freedom of speech and expression, for violation of the right to remain silent by the impugned circular which obligated otherwise. By involving conscientious objection based on Article 25, the negative of other fundamental rights can be asserted all the more against the laws and mandates of the State. Right to fast unto death and Euthanasia are the negative of the fundamental right to life under Article 21; right to close down business the negative of the fundamental right to carry on business under Article 19(1)(g) [recognised by the Supreme Court in *Excel Wear v. Union of India*, (1978) 4 SCC 224—(See also the editorial note at p. 230)]; the right not to associate with a students' union or trade union the negative of the fundamental right of association under Article 19(1)(c) etc.

Advocates who appeared in this case:

F.S. Nariman and T.S. Krishnamurthy Iyer, Senior Advocates (*K.J. John and M. Jha*, Advocates, with them), for the Appellants;
G. Viswanatha Iyer, Senior Advocate (*Mrs Baby Krishnan*, Advocate, with him), for Respondents 1 to 3;
P.S. Poti, Senior Advocate (*E.M.S. Anam and James Vincent*, Advocates, with him), for the Respondents.

The Judgment of the Court was delivered by

CHINNAPPA REDDY, J.—The three child-appellants, Bijoe, Binu Mol and Bindu Emmanuel, are the faithful of Jehovah's Witnesses. They attend school. Daily, during the morning Assembly, when the National Anthem 'Jana Gana Mana' is sung, they stand respectfully but they do not sing. They do not sing because, according to them, it is against the tenets of their religious faith—not the words or the thoughts of the anthem but the singing of it. This they and before them their elder sisters who attended the same school earlier have done all these several years. No one bothered. No one worried. No one thought it disrespectful or unpatriotic. The children were left in peace and to their beliefs. That was until July 1985, when some patriotic gentleman took notice. The gentleman thought it was unpatriotic of the children not to sing the National Anthem. He happened to be a Member of the Legislative Assembly. So, he put a question in the Assembly. A Commission was appointed to enquire and report. We do not have the report of the Commission. We are told that the Commission reported that the children are 'law-abiding' and that they showed no disrespect to the National Anthem. Indeed it is nobody's case that the children are other than well-behaved or that they have ever behaved disrespectfully when the National Anthem was sung. They have always stood up in respectful silence. But these matters of conscience, which though better left alone, are sensitive and emotionally evocative. So, under the instructions of Deputy Inspector of Schools, the Headmistress expelled the children from the school from July 26, 1985. The father of the children made representations requesting that his children may be permitted to attend the school pending orders from the government. The Headmistress expressed her helplessness in the matter. Finally the children filed a writ petition in the High Court seeking an order restraining the authorities from preventing

them from attending school. First a learned Single Judge and then a Division Bench rejected the prayer of the children. They have now come before us by special leave under Article 136 of the Constitution.

2. We are afraid the High Court misdirected itself and went off at a tangent. They considered, in minute detail, each and every word and thought of the National Anthem and concluded that there was no word or thought in the National Anthem which could offend anyone's religious susceptibilities. But that is not the question at all. The objection of the petitioners is not to the language or the sentiments of the National Anthem: they do not sing the National Anthem wherever, 'Jana Gana Mana' in India, 'God save the Queen' in Britain, the Star Spangled Banner in the United States and so on. In their words in the writ petition they say:

The students who are Witnesses do not sing the Anthem though they stand up on such occasions to show their respect to the National Anthem. They desist from actual singing only because of their honest belief and conviction that their religion does not permit them to join any rituals except it be in their prayers to Jehovah their God.

3. That the petitioners truly and conscientiously believe what they say is not in doubt. They do not hold their beliefs idly and their conduct is not the outcome of any perversity. The petitioners have not asserted these beliefs for the first time or out of any unpatriotic sentiment. Jehovah's Witnesses, as they call themselves, appear to have always expressed and stood up for such beliefs all the world over as we shall presently show. Jehovah's Witnesses and their peculiar beliefs though little noticed in this country, have been noticed, we find, in the *Encyclopaedia Britannica* and have been the subject of judicial pronouncements elsewhere.

4. In *The New Encyclopaedia Britannica (Macropaedia)* Vol. 10, Page 538, after mentioning that Jehovah's Witnesses are "the adherents of the apocalyptic sect organized by Charles Taze Russell in the early 1870's", it is further mentioned,

They believe that the Watch Tower Bible and Tract Society, their legal agency and publishing arm, exemplifies the will of God and proclaims the truths of the Bible against the evil triumvirate of organized religion, the business world, and the State. . . . The Witnesses also stand apart from civil society, refusing to vote, run for public office, serve in any armed forces, salute the flag, stand for the national anthem, or recite the pledge of allegiance. Their religious stands have brought clashes with various governments, resulting in law suits, mob violence, imprisonment, torture, and death. At one time more than 6000 Witnesses were inmates of Nazi concentration camps. Communist and Fascist States usually forbid Watch Tower activities. In the US the society has taken 45 cases to the Supreme Court and has won significant victories for freedom of religion and speech. The Witnesses have been less successful in claiming exemptions as ministers from military service and in seeking to withhold blood transfusions from their children.

5. Some of the beliefs held by Jehovah's Witnesses are mentioned in a little detail in the statement of case in *Adelaide Company of Jehovah's Witnesses v. The Commonwealth*¹, a case decided by the Australian High Court. It is stated:

Jehovah's Witnesses are an association of persons loosely organized throughout Australia and elsewhere who regard the literal interpretation of the Bible as fundamental to proper religious beliefs.

Jehovah's Witnesses believe that God, Jehovah, is the supreme ruler of the universe. Satan or Lucifer was originally part of God's organization and the perfect man was placed under him. He rebelled against God and set up his own organization in challenge to God and through that organization has ruled the world. He rules and controls the world through material agencies such as organized political, religious, and financial bodies. Christ, they believe, came to earth to redeem all men who would devote themselves entirely to serving God's will and purpose and He will come to earth again (His second coming has already begun) and will overthrow all the powers of evil.

These beliefs lead Jehovah's Witnesses to proclaim and teach publicly both orally and by means of printed books and pamphlets that the British Empire and also other organized political bodies are organs of Satan, unrighteously governed and identifiable with the Beast in the thirteenth chapter of the Book of Revelation. Also that Jehovah's Witnesses are Christians entirely devoted to the Kingdom of God, which is "The Theocracy that they have no part in the political affairs of the world and must not interfere in the least manner with war between nations. They must be entirely neutral and not interfere with the drafting of men of nations they go to war. And also that wherever there is a conflict between the laws of Almighty God and the laws of man the Christian must always obey God's law in preference to man's law. All laws of men, however, in harmony with God's law the Christian obeys. God's law is expounded and taught by Jehovah's Witnesses. Accordingly they refuse to take an oath of allegiance to the King or other constituted human authority.

The case of *Adelaide Company of Jehovah's Witnesses v. The Commonwealth*¹ arose out of an action to restrain the Commonwealth of Australia from enforcing the National Security (Subversive Associations) Regulations to the Jehovah's Witnesses.

6. *Minersville School District v. Gobitis*² and *West Virginia State Board of Education v. Barnette*³ are two cases decided by the American Supreme Court in which Jehovah's Witnesses claimed that they could not be compelled to salute the flag of the United States while reciting pledge of allegiance. In the latter case, Jackson, J. referred to the particular belief of the Witnesses which was the subject-matter of that case, as follows:

The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in

1. 67 CLR 116
2. 84 Law Ed 1375; 310 US 586 (1940)
3. 87 Law Ed 1628, 1633; 319 US 624, 629 (1943)

heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them, nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it.

7. *Donald v. Board of Education for the City Hamilton*⁴ is a case decided by the Court of Appeals of Ontario where the objection by Jehovah's Witnesses was to saluting the flag and singing National Anthem. The Court referred to the following belief of the Jehovah's Witnesses:

The appellants, father and sons, are affiliated with "Jehovah's Witnesses" and believe that saluting the flag and joining in the singing of the National Anthem are both contrary to and forbidden by command of Scripture—the former because they consider the flag an "image" within the literal meaning of Exodus, Chapter XX verses 4 and 5, and the latter because, while they respect the King and State, the prayer voiced in this anthem is not compatible with the belief and hope which they hold in the early coming of the new world, in the government of which present temporal states can have no part.

8. *Sheldon v. Fannin*⁵, a case decided by the United States District Court of Arizona also arose out of the refusal of Jehovah's Witnesses to stand when the National Anthem was sung. The Court observed:

This refusal to participate, even to the extent of standing, without singing, is said to have been dictated by their religious beliefs as Jehovah's Witnesses, requiring their literal acceptance of the Bible as the Word of Almighty God Jehovah. Both precedent and authority for their refusal to stand is claimed to be found in the refusal of three Hebrew children Shadrach, Meshach and Abednege, to bow down at the sound of musical instruments playing patriotic-religious music throughout the land at the order of King Nebuchadnezzar of ancient Babylon. (Daniel 3: 13-28) For a similar reason, members of the Jehovah's Witnesses sect refuse to recite this Pledge of Allegiance to the Flag of the United States viewing this patriotic ceremony to be the worship of a graven image. (Exodus 20: 4-5) However, by some process of reasoning we need not tarry to explore, they are willing to stand during the Pledge of Allegiance, out of respect for the Flag as a symbol of the religious freedom they enjoy. (See *Board of Education v. Barnette*⁶.)

It is evident that Jehovah's Witnesses, wherever they are, do hold religious beliefs which may appear strange or even bizarre to us, but the sincerity of their beliefs is beyond question. Are they entitled to be protected by the Constitution?

9. Article 19(1)(a) of the Constitution guarantees to all citizens freedom of speech and expression, but Article 19(2) provides that nothing in Article 19(1)(a) shall prevent a State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or

4. 1945 Ontario Reports 518.

5. 221 F Supp 766 (1963)

incitement to an offence. Article 25(1) guarantees to all persons freedom of conscience and the right freely to profess, practise and propagate religion, subject to order, morality and health and to the other provisions of Part III of the Constitution. Now, we have to examine whether the ban imposed by the Kerala education authorities against silence when the National Anthem is sung on pain of expulsion from the school is consistent with the rights guaranteed by Articles 19(1)(a) and 25 of the Constitution.

10. We may at once say that there is no provision of law which obliges anyone to sing the National Anthem nor do we think that it is disrespectful to the National Anthem if a person who stands up respectfully when the National Anthem is sung does not join the singing. It is true Article 51-A(a) of the Constitution enjoins a duty on every citizen of India "to abide by the Constitution and respect its ideals and institutions, the National Flag and the National Anthem". Proper respect is shown to the National Anthem by standing up when the National Anthem is sung. It will not be right to say that disrespect is shown by not joining in the singing.

11. Parliament has not been unmindful of 'National Honour'. The Prevention of Insults to National Honour Act was enacted in 1971. While Section 2 deals with insult to the Indian National Flag and the Constitution of India, Section 3 deals with the National Anthem and enacts:

Whoever, intentionally prevents the singing of the National Anthem or causes disturbance to any assembly engaged in such singing shall be punished with imprisonment for a term which may extend to three years, or with fine, or with both.

Standing up respectfully when the National Anthem is sung but not singing oneself clearly does not either prevent the singing of the National Anthem or cause disturbance to an assembly engaged in such singing so as to constitute the offence mentioned in Section 3 of the Prevention of Insults to National Honour Act.

12. The Kerala Education Act contains no provision of relevance, Section 36, however, enables the government to make rules for the purpose of carrying into effect the provisions of the Act and in particular to provide for standards of education and courses of study. The Kerala Education Rules have been made pursuant to the powers conferred by the Act. Chapter VIII of the Rules provides for the organisation of instruction and progress of pupils. Rule 8 of Chapter VIII provides for moral instruction and expressly says Moral instruction should form a definite programme in every school but it should in no way wound the social or religious susceptibilities of the peoples generally. The rule goes on to say that "the components of a high character" should be impressed upon the pupils. One of the components is stated to be "love of one's country." Chapter IX deals with discipline. Rule 6 of Chapter IX provides for the censure, suspension or dismissal of a pupil found guilty of deliberate insubordination, mischief, fraud, malpractice in examinations, conduct likely to cause unwholesome influence on other pupils etc. It is not suggested that the present appellants

have ever been found guilty of misconduct such as that described in Chapter IX, Rule 6. On the other hand, the report of the Commission, we are told, is to the effect that the children have always been well-behaved, law-abiding and respectful.

13. The Kerala Education Authorities rely upon two circulars of September 1961 and February 1970 issued by the Director of Public Instruction, Kerala. The first of these circulars is said to be a Code of Conduct for teachers and pupils and stresses the importance of moral and spiritual values. Several generalisations have been made and under the head patriotism it is mentioned :

Patriotism

1. Environment should be created in the school to develop the right kind of patriotism in the children. Neither religion nor party nor anything of this kind should stand against one's love of the country.
2. For national integration, the basis must be the school.
3. *National Anthem.* As a rule, the whole school should participate in the singing of the National Anthem.

In the second circular also instructions of a general nature are given and para 2 of the circular, with which we are concerned, is as follows :

It is compulsory that all schools shall have the morning assembly every day before actual instruction begins. The whole school with all the pupils and teachers shall be gathered for the assembly. After the singing of the National Anthem the whole school shall, in one voice, take the National Pledge before marching back to the classes.

14. Apart from the fact that the circulars have no legal sanction behind them in the sense that they are not issued under the authority of any statute, we also notice that the circulars do not oblige each and every pupil to join in the singing even if he has any conscientious objection based on his religious faith, nor is any penalty attached to not joining the singing. On the other hand, one of the circulars (the first one) very rightly emphasises the importance of religious tolerance. It is said there, "All religions should be equally respected."

15. If the two circulars are to be so interpreted as to compel each and every pupil to join in the singing of the National Anthem despite his genuine, conscientious religious objection, then such compulsion would clearly contravene the rights guaranteed by Article 19(1)(a) and Article 25(1).

16. We have referred to Article 19(1)(a) which guarantees to all citizens freedom of speech and expression and to Article 19(2) which provides that nothing in Article 19(1)(a) shall prevent a State from making any law, insofar as such law imposes reasonable restrictions on the exercise of the right conferred by Article 19(1)(a) in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence. The law is now well settled that

any law which be made under clauses (2) to (6) of Article 19 to regulate the exercise of the right to the freedoms guaranteed by Article 19(1)(a) to (e) and (g) must be 'a law' having statutory force and not a mere executive or departmental instruction. In *Kharak Singh v. State of UP*⁶ the question arose whether a police regulation which was a mere departmental instruction, having no statutory basis could be said to be a law for the purpose of Article 19(2) to (6). The Constitution Bench answered the question in the negative and said :

Though learned counsel for the respondent started by attempting such a justification by invoking Section 12 of the Indian Police Act he gave this up and conceded that the regulations contained in Chapter XX had no such statutory basis but were merely executive or departmental instructions framed for the guidance of the police officers. They would not therefore be "a law" which the State is entitled to make under the relevant clauses (2) to (6) of Article 19 in order to regulate or curtail fundamental rights guaranteed by the several sub-clauses of Article 19(1), nor would the same be "a procedure established by law" within Article 21. The position therefore is that if the action of the police which is the arm of the executive of the State is found to infringe any of the freedoms guaranteed to the petitioner the petitioner would be entitled to the relief of mandamus which he seeks, to restrain the State from taking action under the regulations.

17. The two circulars on which the department has placed reliance in the present case have no statutory basis and are mere departmental instructions. They cannot, therefore, form the foundation of any action aimed at denying a citizen's Fundamental Right under Article 19(1)(a). Further it is not possible to hold that the two circulars were issued 'in the interest of the sovereignty and integrity of India, the security of the State, friendly relation with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence' and if not so issued, they cannot again be invoked to deny a citizen's Fundamental Right under Article 19(1)(a). In *Kameshwar Prasad v. State of Bihar*⁷, a Constitution Bench of the court had to consider the validity of Rule 4-A of the Bihar Government Servants Conduct Rules which prohibited any form of demonstration even if such demonstration was innocent and incapable of causing a breach of public tranquillity. The court said :

No doubt, if the rule were so framed as to single out those types of demonstration which were likely to lead to a disturbance of public tranquillity or which would fall under the other limiting criteria specified in Article 19(2) the validity of the rule could have been sustained. The vice of the rule, in our opinion, consists in this that it lays a ban on every type of demonstration—be the same however innocent and however incapable of causing a breach of public tranquillity and does not confine itself to those forms of demonstrations which might lead to that result.

6. AIR 1963 SC 1295, 1299; (1964) 1 SCR 332

7. 1962 Supp 3 SCR 369, 383-4; AIR 1962 SC 1165

Examining the action of the Education Authorities in the light of *Kharak Singh v. State of UP*⁸ and *Kameshwar Prasad v. State of Bihar*⁹ we have no option but to hold that the expulsion of the children from the school for not joining the singing of the National Anthem though they respectfully stood up in silence when the Anthem was sung was violative of Article 19(1)(a).

18. Turning next to the Fundamental Right guaranteed by Article 25, we may usefully set out here that article to the extent relevant:

25. (1) Subject to public order, morality and health and to the other provisions of this Part, all persons are equally entitled to freedom of conscience and the right freely to profess, practise and propagate religion.

(2). Nothing in this article shall affect the operation of any existing law or prevent the State from making any law—

- (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice;
- (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus.

(Explanations I and II not extracted as unnecessary.)

Article 25 is an article of faith in the Constitution, incorporated in recognition of the principle that the real test of a true democracy is the ability of even an insignificant minority to find its identity under the country's Constitution. This has to be borne in mind in interpreting Article 25.

19. We see that the right to freedom of conscience and freely to profess, practise and propagate religion guaranteed by Article 25 is subject to (1) public order, morality and health; (2) other provisions of Part III of the Constitution; (3) any law (a) regulating or restricting any economic, financial, political or other secular activity which may be associated with religious practice; or (b) providing for social welfare and reform or the throwing open of Hindu religious institutions of a public character to all classes and sections of Hindus. Thus while on the one hand, Article 25(1) itself expressly subjects the right guaranteed by it to public order, morality and health and to the other provisions of Part III, on the other hand, the State is also given the liberty to make a law to regulate or restrict any economic, financial, political or other secular activity which may be associated with religious practise and to provide for social welfare and reform, even if such regulation, restriction or provision affects the right guaranteed by Article 25(1). Therefore, whenever the Fundamental Right to freedom of conscience and to profess, practise and propagate religion is invoked, the act complained of as offending the Fundamental Right must be examined to discover whether such act is to protect public order, morality and health, whether it is to give effect to the other provisions of Part III of the Constitution or whether it is authorised by a law made to regulate or restrict any economic, financial, political or secular activity which may be

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associated with religious practise or to provide for social welfare and reform. It is the duty and function of the court so to do. Here again as mentioned in connection with Article 19(2) to (6), it must be a law having the force of a statute and not a mere executive or a departmental instruction. We may refer here to the observations of Latham, C.J. in *Adelaide Company of Jehovah's Witnesses v. The Commonwealth*¹, a decision of the Australian High Court quoted by Mukherjea, J. in the *Shirur Mutt* case². Latham, C.J. had said:

The Constitution protects religion within a community organized under a Constitution, so that the continuance of such protection necessarily assumes the continuance of the community so organized. This view makes it possible to reconcile religious freedom with ordered government. It does not mean that the mere fact that the Commonwealth Parliament passes a law in the belief that it will promote the peace, order and good government of Australia precludes any consideration by a court of the question whether or not such a law infringes religious freedom. The final determination of that question by Parliament would remove all reality from the constitutional guarantee. That guarantee is intended to limit the sphere of action of the legislature. The interpretation and application of the guarantee cannot, under our Constitution, be left to Parliament. If the guarantee is to have any real significance it must be left to the courts of justice to determine its meaning and to give effect to it by declaring the invalidity of laws which infringe it and by declining to enforce them. The courts will therefore have the responsibility of determining whether a particular law can fairly be regarded, as a law to protect the existence of the community, or whether, on the other hand, it is a law "for prohibiting the free exercise of any religion". The word "for" shows that the purpose of the legislation in question may properly be taken into account in determining whether or not it is a law of the prohibited character.

What Latham, C.J. has said about the responsibility of the court accords with what we have said about the function of the court when a claim to the Fundamental Right guaranteed by Article 25 is put forward.

20. The meaning of the expression 'religion' in the context of the Fundamental Right to freedom of conscience and the right to profess, practise and propagate religion, guaranteed by Article 25 of the Constitution, has been explained in the well known cases of *Commissioner, Hindu Religious Endowments, Madras v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*³, *Ratilal Panachand Gundhi v. State of Bombay*⁴ and *S.P. Mittal v. Union of India*⁵. It is not necessary for our present purpose to refer to the exposition contained in these judgments except to say that in the first of these cases Mukherjea, J. made a reference to "Jehovah's Witnesses" and appeared to quote with approval the views of Latham, C.J. of the Australian High Court in *Adelaide Company v. The Commonwealth*¹ and those of the American Supreme Court in *West Virginia State Board of Education v. Barnette*⁶. In *Ratilal's case*⁴

8. *Commr., HRE v. Sri Lakshmindra Thirtha Swamiar of Sri Shirur Mutt*, 1954 SCR 1005: AIR 1954 SC 282

9. 1951 SCR 1055: AIR 1954 SC 388, 392

10. (1983) 1 SCC 51

we also notice that Mukherjea, J. quoted as appropriate Davar, J.'s following observations in *Jamshed Ji v. Soonabai*¹¹:

If this is the belief of the community and it is proved undoubtedly to be the belief of the Zoroastrian community,—a secular Judge is bound to accept that belief—it is not for him to sit in judgment on that belief, he has no right to interfere with the conscience of a donor who makes a gift in favour of what he believes to be the advancement of his religion and the welfare of his community or mankind.

We do endorse the view suggested by Davar, J.'s observation that the question is not whether a particular religious belief or practice appeals to our reason or sentiment but whether the belief is genuinely and conscientiously held as part of the profession or practice of religion. Our personal views and reactions are irrelevant. If the belief is genuinely and conscientiously held it attracts the protection of Article 25 but subject, of course, to the inhibitions contained therein.

21. In *Minersville School District v. Gobitis*², the question arose whether the requirement of participation by the pupils and public schools in the ceremony of saluting the national flag did not infringe the liberty guaranteed by the 14th amendment, in the case of a pupil who refused to participate upon sincere religious grounds. Frankfurter, J., great exponent of the theory of judicial restraint that he was, speaking for the majority of the United States Supreme Court upheld the requirement regarding participation in the ceremony of flag salutation primarily on the ground: (L Ed p. 1381)

The wisdom of training children in patriotic impulses by those compulsions which necessarily pervade so much of the educational process is not for our independent judgment. . . . For ourselves, we might be tempted to say that the deepest patriotism is best engendered by giving unfettered scope to the most cherished beliefs. . . . But the courtroom is not the arena for debating issues of educational policy. It is not our province to choose among competing considerations in the subtle process of securing effective loyalty to the traditional ideals of democracy, while respecting at the same time individual idiosyncracies among a people so diversified in racial origins and religious allegiances. So to hold would in effect make us the school board for the country. That authority has not been given to this Court, nor should we assume it.

Frankfurter, J.'s view, it is seen, was founded entirely upon his conception of judicial restraint. In that very case Justice Stone dissented and said: (L Ed p. 1383)

It (the Government) may suppress religious practices dangerous to morals, and presumably those also which are inimical to public safety, health and good order. But it is a long step, and one which I am unable to take, to the position that government may, as a supposed, educational measure and as a means of disciplining young, compel affirmations which violate their religious conscience.

Stone, J. further observed: (L Ed p. 1384)

The very essence of the liberty which they† guarantee is the freedom of the individual from compulsion as to what he shall think and what

11. (1909) 33 Bom 122 : 10 Bom LR 417

† Ed.: Referring to the guarantees of civil liberty

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he shall say, at least where the compulsion is to bear false witness to his religion.

It was further added : (L Ed p. 1384)

History teaches us that there have been but few infringements of personal liberty by the State which have not been justified, as they are here, in the name of righteousness and the public good, and few which have not been directed, as they are now, at politically helpless minorities.

22. We do not think that it is necessary to consider the case of *Gobitis*² at greater length as the decision was overruled very shortly after it was pronounced by the same court in *West Virginia State Board of Education v. Barnette*³. Justices Black and Douglas who had agreed with Justice Frankfurter in the *Gobitis*'s case retraced their steps and agreed with Justice Jackson who gave the opinion of the court in *West Virginia State Board of Education v. Barnette*⁴. Justice Jackson in the course of his opinion observed :

It is also to be noted that the compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind. It is not clear whether the regulation contemplates the pupils forego any contrary convictions of their own and become unwilling converts to the prescribed ceremony or whether it will be acceptable if they simulate assent by words without belief and by a gesture barren of meaning. It is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish. It would seem that involuntary affirmation could be commanded only on even more immediate and urgent grounds than silence. But here the power of compulsion is invoked without any allegation that remaining passive during a flag salute ritual creates a clear present danger that would justify an effort even to muffle expression. To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

Justice Jackson referred to Lincoln's famous dilemma : "Must a government of necessity be too strong for the liberties of its people, or to weak to maintain its own existence?" and added :

It may be doubted whether Mr. Lincoln would have thought that the strength of government to maintain itself would be impressively vindicated by our confirming power of the state to expel a handful of children from school. Such oversimplification, so handy in political debate, often lacks the precision necessary to postulates of judicial reasoning. If validly applied to this problem, the utterance cited would resolve every issue of power in favour of those in authority and would require us to override every liberty thought to weaken or delay execution of their policies.

Government of limited power need not be anaemic government. Assurance that rights are secure tends to diminish fear and jealousy of strong government, and by making us feel safe to live under it makes for its better support. Without promise of a limiting Bill of Rights it is doubtful if our Constitution could have mustered enough strength to

enable its ratification. To enforce those rights today is not to choose weak government over strong government. It is only to adhere as a means of strength to individual freedom of mind in preference to officially disciplined uniformity for which history indicates a disappointing and disastrous end.

Dealing with the argument that any interference with the authority of the School Board would in effect make the court the School Board for the country as suggested by Justice Frankfurter, Justice Jackson said:

There are village tyrants as well as village Hampdens, but none who acts under colour of law is beyond reach of the Constitution. . . . We cannot, because of modest estimates of our competence in such specialities as public education, withhold the judgment that history authenticates as the function of this Court when liberty is infringed.

Justice Jackson ended his opinion with the statement

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.

23. *Sheldon v. Fannin*¹ was a case where the pupils refused even to stand when the National Anthem was sung. We do not have to consider that situation in the present case since it is the case of the appellants and it is not disputed that they have always stood up and they will always stand up respectfully when the National Anthem is sung.

24. *Donald v. Board of Education for the City Hamilton*, was again a case of objection by Jehovah's Witnesses to flag salutation and singing the National Anthem. Gillanders, J.A., said:

There is no doubt that the teachers and the school board, in the case now being considered, in good faith prescribed the ceremony of the flag salute only with the thought of inculcating respect for the flag and the Empire or Commonwealth of Nations which events of recent years have given more abundant reason than ever before to love and respect. If I were permitted to be guided by my personal views, I would find it difficult to understand how any well disposed person could offer objection to joining in such a salute on religious or other grounds. To me, a command to join the flag salute or the singing of the National Anthem would be a command not to join in any enforced religious exercise, but, viewed in proper perspective, to join in an act of respect for a contrary principle, that is, to pay respect to a nation and country which stands for religious freedom, and the principle that people may worship as they please, or not at all.

But, in considering whether or not such exercises may or should, in this case, be considered as having devotional or religious significance,

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it would be misleading to proceed on any personal views on what such exercises might include or exclude.

After referring to Jackson, J.'s opinion in *West Virginia State Board of Education v. Barnette*¹² and some other cases, it was further observed:

For the court to take to itself the right to say that the exercises here in question had no religious or devotional significance might well be for the court to deny that very religious freedom which the statute is intended to provide.

It is urged that the refusal of the infant appellants to join in the exercises in question is disturbing and constitutes conduct injurious to the moral tone of the school. It is not claimed that the appellants themselves engaged in any alleged religious ceremonies or observations, but only that they refrained from joining in the exercises in question. . . . To do just that could not, I think be viewed as conduct injurious to the moral tone of the school or class.

25. We are satisfied, in the present case, that the expulsion of the three children from the school for the reason that because of their conscientiously held religious faith, they do not join the singing of the National Anthem in the morning assembly though they do stand up respectfully when the anthem is sung, is a violation of their fundamental right 'to freedom of conscience and freely to profess, practise and propagate religion'.

26. Shri Vishwanath Iyer and Shri Poti, who appeared for the respondents suggested that the appellants, who belonged but to a religious denomination could not claim the Fundamental Right guaranteed by Article 25(1) of the Constitution. They purported to rely upon a sentence in the judgment of this court in *Acharya Jagdishwaranand v. Commissioner of Police, Calcutta*.¹² The question in that case was whether the Ananda Margis had a fundamental right within the meaning of Article 25 or Article 26 to perform Tandava dance in public streets and public places. The court found that Ananda Marga was a Hindu religious denomination and not a separate religion. The court examined the question whether the Tandava dance was a religious rite or practice essential to the tenets of the Ananda Marga and found that it was not. On that finding the court concluded that the Ananda Marga had no fundamental right to perform Tandava dance in public streets and public places. In the course of the discussion, at one place, there is found the following sentence: (SCC p. 530, para 9)

Mr. Tarkunde for the petitioner had claimed protection of Article 25 of the Constitution but in view of our finding that Ananda Marga was not a separate religion, application of Article 25 is not attracted.

This sentence appears to have crept into the judgment by some slip. It is not a sequitur to the reasoning of the court on any of the issues. In fact, in the subsequent paragraphs, the Court has expressly proceeded to consider the claim of the Ananda Marga to perform Tandava dance in public streets pursuant to the right claimed by them under Article 25(1).

12. AIR 1984 SC 51: (1983) 4 SCC 522

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27. We, therefore, find that the Fundamental Rights of the appellants under Articles 19(1)(a) and 25(1) have been infringed and they are entitled to be protected. We allow the appeal, set aside the judgment of the High Court and direct the respondent authorities to re-admit the children into the school, to permit them to pursue their studies without hindrance and to facilitate the pursuit of their studies by giving them the necessary facilities. We only wish to add: our tradition teaches tolerance; our philosophy preaches tolerance; our Constitution practises tolerance; let us not dilute it.

28. The appellants are entitled to their costs.

(1986) 3 Supreme Court Cases 632

(BEFORE P.N. BHAGWATI, C.J. AND RANGANATH MISRA, J.)

SHEELA BARSE (II) AND OTHERS

Petitioners ;

Versus

UNION OF INDIA AND OTHERS

... Respondents.

Writ Petition (Criminal) No. 1451 of 1985†,
decided on August 13, 1986

Constitution of India -- Articles 21 and 32 -- Physically and mentally retarded children and abandoned or destitute children kept in jails -- Public interest writ petition against -- Directions issued specifying that they be lodged in protective or observation homes, investigation and trials against them be expedited, juvenile courts be set up one in each district and cadre of trained magistrates for dealing with such cases be formed, investigation and trial against children accused of offences punishable with imprisonment of not more than 7 years be completed within 3 and 6 months from the dates of filing FIR and completion of trial respectively in future and from the date of the present order in pending cases -- Enactment and implementation of Children Act by Parliament desired

Hussainara Khatoon (I) v. Home Secretary, State of Bihar. (1980) 1 SCC 81 : 1980 SCC (Cr) 23 : (1979) 1 SCR 169 : AIR 1979 SC 1360 : 1979 Cri LJ 1036, referred to

R-M/7446/CR

Advocates who appeared in this case :

Petitioner-in-person :

Harbans Lal, Senior Advocate (Tapas Ray, D.K. Sinha, J.R. Das, Girish Chander, Ms. Subashini, Pramod Swarup, D. Bhandari, C.V.S. Rao, B.D. Sarmia, D.N. Mukherjee, R. Mukherjee, A.V. Rangam, T.V. Ratnam, S.B. Bhasme, A.S. Bhasme and A.M. Khanolkar, Advocates, with him), for the Respondents.

ORDER

1. We made an order on July 12, 1986 issuing various directions in regard to physically and mentally retarded children as also abandoned

†Under Article 32 of the Constitution of India

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preserve discipline that the changes in the rule were effected. We are not satisfied that there has been violation of any law in doing so.

21. On a careful consideration of the questions involved in this appeal, we hold that the High Court was right in its decision. We accordingly dismiss the appeal.

(1987) 1 Supreme Court Cases 124

(BEFORE P.N. BHAGWATI, C.J. AND RANGANATH MISRA, V. KHALID,
G.L. OZA AND M.M. DUTT, JJ.)

Writ Petition No. 12437 of 1985†

S.P. SAMPATH KUMAR .. Petitioner;
Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petition No. 12460 of 1985†

J. N. GUPTA .. Petitioner;
Versus

UNION OF INDIA AND OTHERS .. Respondents.

And

Writ Petition No. 238 of 1986†

D.J. SOMAIYA AND ANOTHER .. Petitioners;
Versus

UNION OF INDIA AND OTHERS .. Respondents.

Writ Petitions Nos. 12437 and 12460 of 1985 and 238 of 1986 with
Transferred Cases Nos. 9-11 and 12-13 of 1986 in Transfer
Petitions Nos. 312-320 of 1985, decided on
December 9, 1986

Administrative Tribunals Act, 1985 — Section 28 — Exclusion of High Courts' jurisdiction under Articles 226 and 227 of judicial review in service matters however keeping jurisdiction of Supreme Court under Articles 32 and 136 open — Constitutionality — Held, the Act would not be rendered unconstitutional if the amendments in the provisions thereof (Sections 4, 6 and 8), as suggested by Supreme Court, are carried out within a reasonable period (March 31, 1987) so as to make the Administrative Tribunal constituted under it an equally efficacious and effective alternative to the High Court

Administrative Tribunals Act, 1985 — Section 4 — Must be amended so as not to confer absolute and unfettered discretion on Government in the matter of appointment of Chairman, Vice-Chairmen and Administrative Members of the Tribunal — Suggestions made in this regard

Administrative Tribunals Act, 1985 — Section 4 — There must be a permanent bench or if there is not sufficient work, then a circuit bench of the Tribunal at every place where there is a seat of the High Court

Administrative Tribunals Act, 1985 — Section 6(1)(c) — Held, invalid and must be deleted

†Under Article 32 of the Constitution of India

Administrative Tribunals Act, 1985 — Section 6(2) — Must be amended so as to make District Judge or advocate who is qualified to be a High Court Judge eligible for appointment as Vice-Chairman

Administrative Tribunals Act, 1985 — Section 8 — Term of five years of office under, too short — Should be suitably amended

Constitution of India — Article 323-A [as introduced by Constitution (Forty-second Amendment) Act, 1976] — Constitutional amendment of 1976 authorising exclusion of jurisdiction of High Court under Articles 226 and 227 postulates for its validity that the law made under Article 323-A(1) excluding such jurisdiction must provide for an effective alternative institutional mechanism or authority for judicial review

Constitution of India — Articles 226, 227, 32, 136 and 368 — Judicial review — Exclusion of — Constitutional amendment permitting enactment of law excluding judicial review altogether would affect basic structure of the Constitution — But partial exclusion with provision for setting up effective alternative institutional mechanisms or arrangements for judicial review permissible

A Division Bench of the Supreme Court by its order dated October 31, 1985 [(1985) 4 SCC 458] had issued rule nisi on the writ petitions of the petitioner S.P. Sampath Kumar and others. It had issued certain interim directions and had referred the writ petitions to a Constitution Bench of five Judges for decision. Accordingly the Constitution Bench heard the petitions and rendered the present judgments. The main judgment was delivered by Ranganath Misra, J. and Bhagwati, C.J. delivered a concurring judgment. Both judgments have been signed by all the five Judges.

Held : *Per curiam*

The Administrative Tribunals Act by its Section 28 has excluded the power of judicial review exercised by the High Courts in Service matters under Articles 226 and 227. But it has not excluded the judicial review wholly inasmuch as the jurisdiction of the apex Court under Articles 32 and 136 has been kept intact. There is thus a forum where matters of importance and grave injustice can be brought for determination or rectification. (Paras 14 and 16)

The Act was enacted under Article 323-A(1). Article 323-A was introduced by the Constitution (Forty-second Amendment) Act, 1976. Clause (2)(d) of Article 323-A specifically authorises the exclusion of jurisdiction of the High Court under Articles 226 and 227 by any law made by Parliament. But it must be read as implicit in Article 323-A that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it must not leave a void but it must set up another effective institutional mechanism or authority and vest the power of judicial review in it. Though judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution, but if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set up by the parliamentary amendment is no less effective than the High Court. (Paras 3 and 4)

Mineroa Mills Ltd. v. Union of India, (1980) 3 SCC 625; (1981) 1 SCR 206; AIR 1980 SC 1789, relied on

K.K. Datta v. Union of India, (1980) 4 SCC 38; (1980) 3 SCR 811, referred to

The Administrative Tribunal under the Act has been contemplated as a substitute and not as supplemental to the High Court in the scheme of adminis-

tration of justice and it is entitled to exercise powers thereof. To provide the Tribunal as an additional forum from where parties could go to the High Court would certainly have been a retrograde step considering the situation and circumstances to meet which the innovation has been brought about. Thus barring of the jurisdiction of the High Court cannot be a valid ground of attack.

(Para 16)

But the Tribunal should be a real substitute of the High Court—not only in form and de jure but in content and de facto. The alternative arrangement has to be effective and efficient as also capable of upholding the constitutional limitations. It has, therefore, to be seen whether the Administrative Tribunal established under the impugned Act can be regarded as equally effective and efficacious in exercising the power of judicial review as the High Court acting under Articles 226 and 227.

(Paras 4 and 17)

In respect of qualifications of the Chairman of the Tribunal prescribed in Section 6 of the Act, clauses (a) and (b) of sub-section (1) are not objectionable. The Chairman should be or should have been a Judge of a High Court. Ordinarily a retiring or retired Chief Justice of a High Court or when such a person is not available, a Senior Judge of proven ability either in office or retired should be appointed. That office should for all practical purposes be equated with the office of Chief Justice of a High Court. But clause (c) of Section 6(1) must be struck down as invalid. Appointing as Chairman of the Administrative Tribunal one who has merely held the post of a Secretary to the Government and who has no legal or judicial experience would not only fail to inspire confidence in the public mind but would also render the Administrative Tribunal a much less effective and efficacious mechanism than the High Court.

(Paras 5 and 21)

Under Section 6(2), a Vice-Chairman with these qualifications and experience of two years may be considered for appointment as Chairman. But Section 6(2) provides a little weightage in favour of the members of the Services and value-discounting of the judicial members inasmuch as a District Judge or an advocate who is qualified to be a Judge of a High Court has not been considered eligible for appointment as the Vice-Chairman. This has the effect of making the Tribunal less effective and efficacious than the High Court. Accordingly, a District Judge or an advocate who is qualified to be a Judge of the High Court should be regarded as eligible for being Vice-Chairman of the Administrative Tribunal and unless an amendment to that effect is carried out on or before March 31, 1987, the impugned Act would have to be declared to be invalid, because the provision in regard to composition of the Administrative Tribunal cannot be severed from the other provisions contained in the impugned Act.

(Paras 6 and 21)

[Ed. Though clause (c) of Section 6(1) has been declared invalid, the corresponding clauses of Section 6(2) have not been specifically held to be invalid.]

So far as the appointment of Chairman, Vice-Chairman and Administrative Members is concerned, the sole and exclusive power to make such appointment is conferred on the Government under the impugned Act. There is no obligation cast on the Government to consult the Chief Justice of India or to follow any particular selection procedure in this behalf. Almost all cases in regard to service matters which come before the Administrative Tribunal would be against the Government or any of its officers and it would not be conducive to judicial independence to leave such unfettered and unrestricted discretion in the executive. Moreover, the power of appointment and promotion vested in the executive can have prejudicial effect on the independence

S.P. SAMPATH KUMAR v. UNION OF INDIA (*Bhagwati, C.J.*)

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of the Chairman, Vice-Chairman and Members of the Administrative Tribunal, if such power is absolute and unfettered. Since total insulation of the judiciary from all forms of interference from the coordinate branches of Government is a basic essential feature of the Constitution, the same independence from possibility of executive pressure or influence must also be ensured to the Chairman, Vice-Chairman and Members of the Administrative Tribunal. Therefore, the appointment of Chairman, Vice-Chairman and Administrative Members should be made by the concerned Government only after consultation with the Chief Justice of India and such consultation must be meaningful and effective and ordinarily the recommendation of the Chief Justice of India must be accepted unless there are cogent reasons, in which event the reasons must be disclosed to the Chief Justice of India and his response must be invited to such reasons. Alternatively, a high powered Selection Committee headed by the Chief Justice of India or a sitting Judge of the Supreme Court or concerned High Court nominated by the Chief Justice of India may be set up for such selection. If either of these two modes of appointment is adopted, it would save the impugned Act from invalidation. Otherwise, it will be outside the scope of the power conferred on Parliament under Article 323-A. However, the judgment shall operate prospectively and would not affect appointments already made to the offices of Vice-Chairman and Member—both administrative and judicial. (Paras 7 and 21)

The term of five years prescribed under Section 8 for Chairman, Vice-Chairman or other members of the Tribunal requiring them to retire at the end of five years is neither convenient to the person selected for the job nor expedient to the scheme. When amendments to the Act are undertaken, this aspect of the matter deserves to be considered, particularly because the choice in that event would be wide leaving scope for proper selection to be made. (Para 22)

Lastly, the Government must set up a permanent bench, and if that is not feasible having regard to the volume of work, then at least a circuit bench, of the Administrative Tribunal wherever there is a seat of the High Court, on or before March 31, 1987. That would be necessary if the provisions of the impugned Act are to be sustained. (Para 3)

[The Court desired that the above amendments be carried out within a reasonable period not beyond March 31, 1987.] (Para 23)

R-M/7634/CA

Advocates who appeared in this case:

Raju Ramachandran, Mukul Mudgal, Mrs S. Ramachandran N.J. Mehta, P.H. Parekh, D. Krishnamurthy, K.N. Rai, K.R. Nagaraja, M. Malini Podaval, H N. Verma, S.K. Bhargava and P.D. Sharma, Advocates, for the Petitioners.
K. Parasaran, Attorney-General, Vepa P. Sarathy, Senior Advocate (Ms A. Subashini, Advocate, with them), for the Respondents.
S.K. Sinha and S.K. Verma, Advocates, for the Respondents.

The Judgments of the Court were delivered by

BHAGWATI, C.J. (Concurring)*—I am in entire agreement with the judgment prepared by my learned Brother Ranganath Misra, but since the questions involved in these writ petitions are of seminal importance affecting, as they do, the structure of the judicial system and the principle of independence of the Judiciary, I think I would be failing in my duty if I did not add a few words of my own.

*The signatures of all five judges have been appended to this concurring judgment

2. There are two questions which arise for consideration in these writ petitions and they have been succinctly set out in the judgment of Ranganath Misra, J. The first question is whether the exclusion of the jurisdiction of the High Court under Articles 226 and 227 of the Constitution in service matters specified in Section 28 of the Administrative Tribunals Act, 1985 (hereinafter referred to as the impugned Act) and the vesting of exclusive jurisdiction in such service matters in the Administrative Tribunal to be constituted under the impugned Act, subject to an exception in favour of the jurisdiction of this Court under Articles 32 and 136, is unconstitutional and void and in any event, even if the first question be answered against the petitioners and in favour of the government, the second question required to be considered is, whether the composition of the Administrative Tribunal and the mode of appointment of Chairman, Vice-Chairman and members have the effect of introducing a constitutional infirmity invalidating the provisions of the impugned Act. I agree with the answers given to these questions in the judgment of Ranganath Misra, J. I would articulate my reasons as follows :

3. It is now well settled as a result of the decision of this Court in *Minerva Mills Ltd. v. Union of India*¹ that judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away. If the power of judicial review is abrogated or taken away the Constitution will cease to be what it is. It is a fundamental principle of our constitutional scheme that every organ of the State, every authority under the Constitution, derives its power from the Constitution and has to act within the limits of such power. It is a limited government which we have under the Constitution and both the executive and the legislature have to act within the limits of the power conferred upon them under the Constitution. Now a question may arise as to what are the powers of the executive and whether the executive has acted within the scope of its power. Such a question obviously cannot be left to the executive to decide and for two very good reasons. First the decision of the question would depend upon the interpretation of the Constitution and the laws and this would preeminently be a matter fit to be decided by the judiciary, because it is the judiciary which alone would be possessed of expertise in this field and secondly, the constitutional and legal protection afforded to the citizen would become illusory, if it were left to the executive to determine the legality of its own action. So also if the legislature makes a law and a dispute arises whether in making the law, the legislature has acted outside the area of its legislative competence or the law is violative of the fundamental rights or of any other provisions of the Constitution, its resolution cannot, for the same reasons, be left to the determination of the legislature. The Constitution has, therefore created an independent machinery for resolving these disputes and this independent machinery is the judiciary which is vested with the power of judicial review to determine the legality of executive action and the validity of

1. (1981) 1 SCR 206 : (1980) 3 SCC 625 : AIR 1980 SC 1789

legislation passed by the legislature. The judiciary is constituted the ultimate interpreter of the Constitution and to it is assigned the delicate task of determining what is the extent and scope of the power conferred on each branch of government, what are the limits on the exercise of such power under the Constitution and whether any action of any branch transgresses such limits. It is also a basic principle of the Rule of Law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of power by the executive or any other authority must not only be conditioned by the Constitution but also be in accordance with law and it is the judiciary which has to ensure that the law is observed and there is compliance with the requirements of law on the part of the executive and other authorities. This function is discharged by the judiciary by exercise of the power of judicial review which is a most potent weapon in the hands of the judiciary for maintenance of the Rule of Law. The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the Rule of Law would become a teasing illusion and a promise of unreality. That is why I observed in my judgment in *Minerva Mills Ltd. case*¹ at pages 287 and 288 : (SCC p. 678, para 87)

I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for *judicial review* cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground, even if it is outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review and providing that no amendment made in the Constitution shall be liable to be questioned on any ground, even if such amendment is violative of the basic structure and, therefore, outside the amendatory power of Parliament, it would be making Parliament sole judge of the constitutional validity of what it has done and that would, in effect and substance, nullify the limitation on the amending power of Parliament and affect the basic structure of the Constitution. The conclusion must therefore inevitably follow that clause (4) of the Article 368 is unconstitutional and void as damaging the basic structure of the Constitution.

It is undoubtedly true that my judgment in *Minerva Mills Ltd. case*¹ was a minority judgment but so far as this aspect is concerned, the majority Judges also took the same view and held that judicial review is a basic and essential feature of the Constitution and it cannot be abrogated without affecting the basic structure of the Constitution and it is equally clear from the same decision

that though judicial review cannot be altogether abrogated by Parliament by amending the Constitution in exercise of its constituent power, Parliament can certainly, without in any way violating the basic structure doctrine, set up effective alternative institutional mechanisms or arrangements for judicial review. The basic and essential feature of judicial review cannot be dispensed with but it would be within the competence of Parliament to amend the Constitution so as to substitute in place of the High Court, another alternative institutional mechanism or arrangement for judicial review, provided it is no less efficacious than the High Court. Then, instead of the High Court, it would be another institutional mechanism or authority which would be exercising the power of judicial review with a view to enforcing the constitutional limitations and maintaining the Rule of Law. Therefore, if any constitutional amendment made by Parliament takes away from the High Court the power of judicial review in any particular area and vests it in any other institutional mechanism or authority, it would not be violative of the basic structure doctrine, so long as the essential condition is fulfilled, namely, that the alternative institutional mechanism or authority set up by the parliamentary amendment is no less effective than the High Court.

4. Here, in the present case, the impugned Act has been enacted by Parliament in exercise of the power conferred by clause (1) of Article 323-A which was introduced in the Constitution by Constitution (42nd Amendment) Act, 1976. Clause (2)(d) of this article provides that a law made by Parliament under clause (1) may exclude the jurisdiction of courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1). The exclusion of the jurisdiction of the High Court under Articles 226 and 227 by any law made by Parliament under clause (1) of Article 323-A is, therefore, specifically authorised by the constitutional amendment enacted in clause (2)(d) of that article. It is clear from the discussion in the preceding paragraph that this constitutional amendment authorising exclusion of the jurisdiction of the High Court under Articles 226 and 227 postulates for its validity that the law made under clause (1) of Article 323-A excluding the jurisdiction of the High Court under Articles 226 and 227 must provide for an effective alternative institutional mechanism or authority for judicial review. If this constitutional amendment were to permit a law made under clause (1) of Article 323-A to exclude the jurisdiction of the High Court under Articles 226 and 227 without setting up an effective alternative institutional mechanism or arrangement for judicial review, it would be violative of the basic structure doctrine and hence outside the constituent power of Parliament. It must, therefore, be read as implicit in this constitutional amendment that the law excluding the jurisdiction of the High Court under Articles 226 and 227 permissible under it must not leave a void but it must set up another *effective* institutional mechanism or authority and vest the power of judicial review in it. Consequently, the impugned Act excluding the jurisdiction of the High Court under Articles 226 and 227 in respect of service matters and vesting such jurisdiction in the Administrative Tribunal can pass

the test of constitutionality as being within the ambit and coverage of clause (2)(d) of Article 323-A, only if it can be shown that the Administrative Tribunal set up under the impugned Act is equally efficacious as the High Court, so far as the power of judicial review over service matters is concerned. We must, therefore, address ourselves to the question whether the Administrative Tribunal established under the impugned Act can be regarded as equally effective and efficacious in exercising the power of judicial review as the High Court acting under Articles 226 and 227 of the Constitution.

5. It is necessary to bear in mind that service matters which are removed from the jurisdiction of the High Court under Articles 226 and 227 of the Constitution and entrusted to the Administrative Tribunal set up under the impugned Act for adjudication involve questions of interpretation and applicability of Articles 14, 15, 16 and 311 in quite a large number of cases. These questions require for their determination not only judicial approach but also knowledge and expertise in this particular branch of constitutional law. It is necessary that those who adjudicate upon these questions should have some modicum of legal training and judicial experience because we find that some of these questions are so difficult and complex that they baffle the minds of even trained judges in the High Courts and the Supreme Court. That is the reason why at the time of the preliminary hearing of these writ petitions we insisted that every bench of the Administrative Tribunal should consist of one judicial member and one administrative member and there should be no preponderance of administrative members on any bench. Of course, the presence of the administrative member would provide input of practical experience in the functioning of the services and add to the efficiency of the Administrative Tribunal but the legal input would undeniably be more important and sacrificing the legal input or not giving it sufficient weightage would definitely impair the efficacy and effectiveness of the Administrative Tribunal as compared to the High Court. Now Section 6 provides that the Chairman of the Administrative Tribunal should be or should have been a Judge of the High Court or he should have for at least two years held office of Vice-Chairman or he should have for at least two years held the post of Secretary to the Government of India or any other post under the Central or State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India. I entirely agree with Ranganath Misra, J. that the Chairman of the Administrative Tribunal should be or should have been a Judge of a High Court or he should have for at least two years held office as Vice-Chairman. If he has held office as Vice-Chairman for a period of at least two years he would have gathered sufficient experience and also within such period of two years, acquired reasonable familiarity with the constitutional and legal questions involved in service matters. But substituting the Chief Justice of a High Court by a Chairman of the Administrative Tribunal who has merely held the post of a Secretary to the government and who has no legal or judicial experience would not only fail to inspire confidence in the public mind but would also render the Administrative Tribunal a much less effective and efficacious

mechanism than the High Court. We cannot afford to forget that it is the High Court which is being supplanted by the Administrative Tribunal and it must be so manned as to inspire confidence in the public mind that it is a highly competent and expert mechanism with judicial approach and objectivity. Of course, I must make it clear that when I say this, I do not wish to cast any reflection on the members of the Civil Services because fortunately we have, in our country, brilliant civil servants who possess tremendous sincerity, drive and initiative and who have remarkable capacity to resolve and overcome administrative problems of great complexity. But what is needed in a judicial tribunal which is intended to supplant the High Court is legal training and experience. I am, therefore, of the view, in agreement with Ranganath Misra, J. that clause (c) of Section 6 (1) must be struck down as invalid.

6. I also fail to see why a District Judge or an advocate who is qualified to be a Judge of a High Court should not be eligible to be considered for appointment as Vice-Chairman of the Administrative Tribunal. It may be noted that since the Administrative Tribunal has been created in substitution of the High Court, the Vice-Chairman of the Administrative Tribunal would be in the position of a High Court Judge and if a District Judge or an advocate qualified to be a Judge of the High Court, is eligible to be a High Court Judge, there is no reason why he should not equally be eligible to be a Vice-Chairman of the Administrative Tribunal. Can the position of a Vice-Chairman of the Administrative Tribunal be considered higher than that of a High Court Judge so that a person who is eligible to be a High Court Judge may yet be regarded as ineligible for becoming a Vice-Chairman of the Administrative Tribunal. It does appear that the provisions of the impugned Act in regard to the composition of the Administrative Tribunal are a little weighted in favour of members of the Services. This weightage in favour of the members of the Services and value-discounting of the judicial members does have the effect of making the Administrative Tribunal less effective and efficacious than the High Court. I would therefore suggest that a District Judge or an advocate who is qualified to be a Judge of the High Court should be regarded as eligible for being Vice-Chairman of the Administrative Tribunal and unless an amendment to that effect is carried out on or before March 31, 1987, the impugned Act would have to be declared to be invalid, because the provision in regard to composition of the Administrative Tribunal cannot be severed from the other provisions contained in the impugned Act.

7. That takes me to another serious infirmity in the provisions of the impugned Act in regard to the mode of appointment of the Chairman, Vice-Chairman and members of the Administrative Tribunal. So far as the appointment of judicial members of the Administrative Tribunal is concerned, there is a provision introduced in the impugned Act by way of amendment that the judicial members shall be appointed by the government concerned in consultation with the Chief Justice of India. Obviously no exception can be taken to this provision, because even so far as Judges of the High Court are concerned,

their appointment is required to be made by the President inter alia in consultation with the Chief Justice of India. But so far as the appointment of Chairman, Vice-Chairmen and administrative members is concerned, the sole and exclusive power to make such appointment is conferred on the government under the impugned Act. There is no obligation cast on the government to consult the Chief Justice of India or to follow any particular selection procedure in this behalf. The result is that it is left to the absolute unfettered discretion of the government to appoint such person or persons as it likes as Chairman, Vice-Chairman and administrative members of the Administrative Tribunal. Now it may be noted that almost all cases in regard to service matters which come before the Administrative Tribunal would be against the government or any of its officers and it would not at all be conducive to judicial independence to leave unfettered and unrestricted discretion in the executive to appoint the Chairman, Vice-Chairmen and administrative members, if a judicial member or an administrative member is looking forward to promotion as Vice-Chairman or Chairman, he would have to depend on the goodwill and favourable stance of the executive and that would be likely to affect the independence and impartiality of the members of the Tribunal. The same would be the position vis-a-vis promotion to the office of Chairman of the Administrative Tribunal. The administrative members would also be likely to carry a sense of obligation to the executive for having been appointed members of the Administrative Tribunal and that would have a tendency to impair the independence and objectivity of the members of the Tribunal. There can be no doubt that the power of appointment and promotion vested in the executive can have prejudicial effect on the independence of the Chairman, Vice-Chairmen and members of the Administrative Tribunal, if such power is absolute and unfettered. If the members have to look to the executive for advancement, it may tend, directly or indirectly, to influence their decision-making process particularly since the government would be a litigant in most of the cases coming before the Administrative Tribunal and it is the action of the government which would be challenged in such cases. That is the reason why in case of appointment of High Court Judges, the power of appointment vested in the executive is not an absolute unfettered power but it is hedged in by a wholesome check and safeguard and the President cannot make an appointment of a High Court Judge without consultation with the Chief Justice of the High Court and the Chief Justice of India and a healthy convention has grown up that no appointment would be made by the government which is not approved by the Chief Justice of India. This check or safeguard is totally absent in the case of appointment of the Chairman, Vice-Chairmen and administrative members of the Administrative Tribunal and the possibility cannot be ruled out — indeed the litigating public would certainly carry a feeling — that the decision-making process of the Chairman, Vice-Chairmen and members of the Administrative Tribunal might be likely to be affected by reason of dependence on the executive for appointment and promotion. It can no longer be disputed that total insulation of the judiciary from all forms

of interference from the coordinate branches of government is a basic essential feature of the Constitution. The Constitution-makers have made anxious provision to secure total independence of the judiciary from executive pressure or influence. Obviously, therefore, if the Administrative Tribunal is created in substitution of the High Court and the jurisdiction of the High Court under Articles 226 and 227 is taken away and vested in the Administrative Tribunal, the same independence from possibility of executive pressure or influence must also be ensured to the Chairman, Vice-Chairmen and members of the Administrative Tribunal. Or else the Administrative Tribunal would cease to be an equally effective and efficacious substitute for the High Court and the provisions of the impugned Act would be rendered invalid. I am, therefore, of the view that the appointment of Chairman, Vice-Chairmen and administrative members should be made by the concerned government only after consultation with the Chief Justice of India and such consultation must be meaningful and effective and ordinarily the recommendation of the Chief Justice of India must be accepted unless there are cogent reasons, in which event the reasons must be disclosed to the Chief Justice of India and his response must be invited to such reasons. There is also another alternative which may be adopted by the government for making appointments of Chairman, Vice-Chairmen and members and that may be by setting up a High Powered Selection Committee headed by the Chief Justice of India or a sitting Judge of the Supreme Court or concerned High Court nominated by the Chief Justice of India. Both these modes of appointment will ensure selection of proper and competent persons to man the Administrative Tribunal and give it prestige and reputation which would inspire confidence in the public mind in regard to the competence, objectivity and impartiality of those manning the Administrative Tribunal. If either of these two modes of appointment is adopted, it would save the impugned Act from invalidation. Otherwise, it will be outside the scope of the power conferred on Parliament under Article 323-A. I would, however hasten to add that this judgment will operate only prospectively and will not invalidate appointments already made to the Administrative Tribunal. But if any appointments of Vice-Chairmen or administrative members are to be made hereafter, the same shall be made by the government in accordance with either of the aforesaid two modes of appointment.

8. I may also add that if the Administrative Tribunal is to be an equally effective and efficacious substitution for the High Court on the basis of which alone the impugned Act can be sustained, there must be a permanent or if there is not sufficient work, then a circuit bench of the Administrative Tribunal at every place where there is a seat of the High Court. I would, therefore, direct the government to set up a permanent bench and if that is not feasible having regard to the volume of work, then at least a circuit bench of the Administrative Tribunal wherever there is a seat of the High Court, on or before March 31, 1987. That would be necessary if the provisions of the impugned Act are to be sustained. So far as rest of the points dealt with in the judgment of

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Ranganath Misra, J. are concerned, I express my entire agreement with the view taken by him.

RANGANATH MISRA, J†.—The challenge raised to the vires of the Administrative Tribunals Act, 1985, (hereinafter referred to as 'the Act') in an application under Article 32 of the Constitution and the other connected matters has been referred to the Constitution Bench for adjudication. Indisputably the Act has been framed within the ambit of Article 323-A which was brought into the Constitution by the Forty-Second Amendment Act in 1976. In exercise of power vested under Section 1(3) of the Act, the Central Government appointed November 1, 1985 as the date from which the Act would come into force. Thereupon Sampat Kumar and others (W.P. 12460 of 1985) moved this Court and the connected matters were brought before this Court or different High Courts which have since been transferred to this Court to be analogously heard. On October 31, 1985 a Division Bench of this Court gave certain interim directions including stay of transfer of the pending applications under Article 32 which were liable to be transferred to the Tribunal and also for continuance of exercise of jurisdiction under Article 32 in regard to disputes covered under the Act notwithstanding the bar provided in Section 28.

10. In the writ applications as presented, the main challenge was to the abolition of the jurisdiction of this Court under Article 32 in respect of specified service disputes. Challenge was also raised against the taking away of the jurisdiction of the High Court under Articles 226 and 227. It was further canvassed that establishment of benches of the Tribunal at Allahabad, Bangalore, Bombay, Calcutta, Gauhati, Madras and Nagpur with the principal seat at Delhi would still prejudice the parties whose cases were already pending before the respective High Courts located at places other than these places and unless at the seat of every High Court facilities for presentation of applications and for hearing thereof were provided the parties and their lawyers would be adversely affected. The interim order made on October 31, 1985, made provision to meet the working difficulties. Learned Attorney General on behalf of the Central Government assured the court that early steps would be taken to amend the law so as to save the jurisdiction under Article 32, remove other minor anomalies and set up a bench of the Tribunal at the seat of every High Court. By the Administrative Tribunals (Amendment) Ordinance, 1986, these amendments were brought about and by now an appropriate Act of Parliament has replaced the Ordinance. Most of the original grounds of attack thus do not survive and the contentions that were canvassed at the hearing by the counsel appearing for different parties are these :

- (1) Judicial review is a fundamental aspect of the basic structure of our Constitution and bar of the jurisdiction of the High Court under Articles 226 and 227 as contained in Section 28 of the Act cannot be sustained ;

†The signatures of all five judges have been appended to this leading judgment

- (2) Even if the bar of jurisdiction is upheld, the Tribunal being a substitute of the High Court, its constitution and set up should be such that it would in fact function as such substitute and become an institution in which the parties could repose faith and trust ;
- (3) Benches of the Tribunal should not only be established at the seat of every High Court but should be available at every place where the High Courts have permanent benches ;
- (4) So far as Tribunals set up or to be set up by the Central or the State Governments are concerned, they should have no jurisdiction in respect of employees of the Supreme Court or members of the subordinate judiciary and employees working in such establishments inasmuch as exercise of jurisdiction of the Tribunal would interfere with the control absolutely vested in the respective High Courts in regard to the judicial and other subordinate officers under Article 235 of the Constitution.

11. After oral arguments were over, learned Attorney General, after obtaining instructions from the Central Government filed a memorandum to the effect that Section 2(g) of the Act would be suitably amended so as to exclude officers and servants in the employment of the Supreme Court and members and staff of the subordinate judiciary from the purview of the Act. In the same memorandum it has also been said that government would arrange for sittings of the benches of the Tribunal at the seat or seats of each High Court on the basis that 'sittings' will include 'circuit sittings' and the details thereof would be worked out by the Chairman or the Vice-Chairman concerned.

12. With these concessions made by the learned Attorney General, only two aspects remain to be dealt with by us, namely, those covered by the first and the second contentions.

13. Strong reliance was placed on the judgment of Bhagwati, J. (one of us — presently the learned Chief Justice) in *Minerva Mills Ltd. v. Union of India*¹, where it was said : (SCC p. 678, para 87)

The power of judicial review is an integral part of our constitutional system and without it, there will be no government of laws and the rule of law would become a teasing illusion and a promise of unreality. I am of the view that if there is one feature of our Constitution which, more than any other, is basic and fundamental to the maintenance of democracy and the rule of law, it is the power of judicial review and it is unquestionably, to my mind, part of the basic structure of the Constitution. Of course, when I say this I should not be taken to suggest that effective alternative institutional mechanisms or arrangements for *judicial review* cannot be made by Parliament. But what I wish to emphasise is that judicial review is a vital principle of our Constitution and it cannot be abrogated without affecting the basic structure of the Constitution. If by a constitutional amendment, the power of judicial review is taken away and it is provided that the validity of any law made by the legislature shall not be liable to be called in question on any ground, even if it is

1. (1981) 1 SCR 206, 287 : (1980) 3 SCC 625 : AIR 1980 SC 1789

outside the legislative competence of the legislature or is violative of any fundamental rights, it would be nothing short of subversion of the Constitution, for it would make a mockery of the distribution of legislative powers between the Union and the States and render the fundamental rights meaningless and futile. So also if a constitutional amendment is made which has the effect of taking away the power of judicial review...

14. Article 32 was described by Dr Ambedkar in course of the debate in the Constituent Assembly as the 'soul' and 'heart' of the Constitution and it is in recognition of this position that though Article 323-A(2)(d) authorised exclusion of jurisdiction under Article 32 and the original Act had in Section 28 provided for it, by amendment jurisdiction under Article 32 has been left untouched. The Act thus saves jurisdiction of this Court both under Article 32 in respect of original proceedings as also under Article 136 for entertaining appeals against decisions of the Tribunal on grant of special leave. Judicial review by the apex court has thus been left intact.

15. The question that arises, however, for consideration is whether bar of jurisdiction under Articles 226 and 227 affects the provision for judicial review. The right to move the High Court in its writ jurisdiction — unlike the one under Article 32 — is not a fundamental right. Yet, the High Courts, as the working experience of three-and-a-half decades shows have in exercise of the power of judicial review played a definite and positive role in the matter of preservation of fundamental and other rights and in keeping administrative action under reasonable control. In these thirty-six years following the enforcement of the Constitution, not only has India's population been more than doubled but also the number of litigations before the courts including the High Courts has greatly increased. As the pendency in the High Courts increased and soon became the pressing problem of backlog, the nation's attention came to be bestowed on this aspect. Ways and means to relieve the High Courts of the load began to engage the attention of the government at the Centre as also in the various States. As early as 1969, a Committee was set up by the Central Government under the chairmanship of Mr Justice Shah of this Court to make recommendations suggesting ways and means for effective, expeditious and satisfactory disposal of matters relating to service disputes of government servants as it was found that a sizeable portion of pending litigations related to this category. The Committee recommended the setting up of an independent Tribunal to handle the pending cases before this Court and the High Courts. While this report was still engaging the attention of government, the Administrative Reforms Commission also took note of the situation and recommended the setting up of Civil Services Tribunals to deal with appeals of government servants against disciplinary action. In certain States, Tribunals of this type came into existence and started functioning. But the Central Government looked into the matter further as it transpired that the major chunk of service litigations related to matters other than disciplinary action. In May 1976, a Conference of Chief Secretaries of the States discussed this problem. Then came the Forty-Second Amendment of the

Constitution bringing in Article 323-A which authorised Parliament to provide by law "for the adjudication or trial by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connexion with the affairs of the Union or of any State or of any local or other authority within the territory of India or under the control of the Government of India or of any Corporation owned or controlled by the government". As already stated this article envisaged exclusion of the jurisdiction of all courts, except the jurisdiction of the Supreme Court under Article 136, with respect to the disputes or complaints referred to in clause (1). Though the Constitution now contained the enabling power, no immediate steps were taken to set up any Tribunal as contemplated by Article 323-A. A Constitution Bench of this Court in *K. K. Dutta v. Union of India*², observed : [SCC p. 39, para 1 : SCC (L & S) p. 486]

There are few other litigative areas than disputes between members of various services inter se, where the principle that public policy requires that all litigation must have an end can apply with greater force. Public servants ought not to be driven or required to dissipate their time and energy in courtroom battles. Thereby their attention is diverted from public to private affairs and their inter se disputes affect their sense of oneness without which no institution can function effectively. The constitution of Service Tribunals by State Governments with an apex Tribunal at the Centre, which, in the generality of cases, should be the final arbiter of controversies relating to conditions of service, including the vexed question of seniority, may save the courts from the avalanche of writ petitions and appeals in service matters. The proceedings of such Tribunals can have the merit of informality and if they will not be tied down to strict rules of evidence, they might be able to produce solutions which will satisfy many...

In the meantime the problem of the backlog of cases in the High Courts became more acute and pressing and came to be further discussed in Parliament and in conferences and seminars. Ultimately in January 1985, both Houses of Parliament passed the Bill and with the Presidential assent on February 27, 1985, the law enabling the long awaited Tribunal to be constituted came into existence. As already noticed, the Central Government notified the Act to come into force with effect from November 1, 1985.

16. Exclusion of the jurisdiction of the High Courts in service matters and its propriety as also validity have thus to be examined in the background indicated above. We have already seen that judicial review by this Court is left wholly unaffected and thus there is a forum where matters of importance and grave injustice can be brought for determination or rectification. Thus exclusion of the jurisdiction of the High Court does not totally bar judicial review. This Court in *Minerva Mills' case*² did point out that (SCC p. 678, para 87) "effective alternative institutional mechanisms or arrangements for judicial review" can be made by Parliament. Thus it is possible to set up an alternative institution in place of the High Court for providing judicial review.

2. (1980) 3 SCR 811 : (1980) 4 SCC 38 : 1980 SCC (L & S) 485 : AIR 1980 SC 2056

The debates and deliberations spread over almost two decades for exploring ways and means for relieving the High Courts of the load of backlog of cases and for assuring quick settlement of service disputes in the interest of the public servants as also the country cannot be lost sight of while considering this aspect. It has not been disputed before us — and perhaps could not have been — that the Tribunal under the scheme of the Act would take over a part of the existing backlog and a share of the normal load of the High Courts. The Tribunal has been contemplated as a substitute and not as supplemental to the High Court in the scheme of administration of justice. To provide the Tribunal as an additional forum from where parties could go to the High Court would certainly have been a retrograde step considering the situation and circumstances to meet which the innovation has been brought about. Thus barring of the jurisdiction of the High Court can indeed not be a valid ground of attack.

17. What, however, has to be kept in view is that the Tribunal should be a real substitute for the High Court — not only in form and *de jure* but in content and *de facto*. As was pointed out in *Minerva Mills*¹, the alternative arrangement has to be effective and efficient as also capable of upholding the constitutional limitations. Article 16 of the Constitution guarantees equality of opportunity in matters of public employment. Article 15 bars discrimination on grounds of religion, race, caste, sex or place of birth. The touchstone of equality enshrined in Article 14 is the greatest of guarantees for the citizen. Centring around these articles in the Constitution a service jurisprudence has already grown in this country. Under Sections 14 and 15 of the Act all the powers of the courts except those of this Court in regard to matters specified therein vest in the Tribunal — either Central or State. Thus the Tribunal is the substitute of the High Court and is entitled to exercise the powers thereof.

18. The High Courts have been functioning over a century and a quarter and until the Federal Court was established under the Government of India Act, 1935, used to be the highest courts within their respective jurisdictions subject to an appeal to the Privy Council in a limited category of cases. In this long period of about six scores of years, the High Courts have played their role effectively, efficiently as also satisfactorily. The litigant in this country has seasoned himself to look up to the High Court as the unfailing protector of his person, property and honour. The institution has served its purpose very well and the common man has thus come to repose great confidence therein. Disciplined, independent and trained judges well versed in law and working with all openness in an unattached and objective manner have ensured dispensation of justice over the years. Aggrieved people approach the court — the social mechanism to act as the arbiter — not under legal obligation but under the belief and faith that justice shall be done to them and the State's authorities would implement the decision of the court. It is, therefore, of paramount importance that the substitute institution — the Tribunal — must be

a worthy successor of the High Court in all respects. That is exactly what this Court intended to convey when it spoke of an alternative mechanism in *Minerva Mills' case*.¹

19. Chapter II of the Act deals with establishment of Tribunals and benches thereof. Section 4 provides for establishment while Section 5 deals with composition of the Tribunal and benches thereof. Section 6 lays down the qualifications of Chairman, Vice-Chairman and members. So far as the Chairman is concerned, sub-section (1) requires that he should be or have been—

- (a) a Judge of a High Court ; or
- (b) has for at least two years, held office as Vice-Chairman ; or
- (c) has, for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India.

Sub-section (2) prescribing the qualification for Vice-Chairman provides that he should be or have been—

- (a) a Judge of a High Court ; or
- (b) for at least two years, held the post of a Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay which is not less than that of a Secretary to the Government of India ; or
- (bb) for at least five years, held the post of an Additional Secretary to Government of India or any other post carrying equivalent pay ; or
- (c) for a period of not less than three years held office as a judicial member of an Administrative Tribunal.

20. Sub-section (3) prescribes the qualification of a judicial member and requires that : (a) he should be or should have been or qualified to be a Judge of a High Court ; or (b) has been a member of the Indian Legal Service and has held a post in Grade I of that service for at least three years.

21. Sub-section (3-A) provides the qualification for appointment as Administrative Member and lays down that such person (a) should have, for at least two years, held the post of an Additional Secretary to the Government of India or any other post under the Central or a State Government carrying a scale of pay not less than that of an Additional Secretary to Government of India ; or (b) has, for at least three years, held the post of a Joint Secretary to the Government of India or any other post under the Central or the State Government carrying a scale of pay which is not less than that of a Joint Secretary to Government of India. So far as the Chairman is concerned, we are of the view that ordinarily a retiring or retired Chief Justice of a High Court or when such a person is not available, a Senior Judge of proved ability either

in office or retired should be appointed. That office should for all practical purposes be equated with the office of Chief Justice of a High Court. We must immediately point out that we have no bias, in any manner, against members of the Service. Some of them do exhibit great candour, wisdom, capacity to deal with intricate problems with understanding, detachment and objectiveness but judicial discipline generated by experience and training in an adequate dose is, in our opinion, a necessary qualification for the post of Chairman. We agree that a Vice-Chairman with these qualifications and experience of two years may be considered for appointment as Chairman but in order that the Tribunal may be acceptable to the litigants who are themselves members of the various services, Section 6(1)(c) should be omitted. We do not want to say anything about Vice-Chairman and members dealt with in sub-sections (2), (3) or (3-A) because so far as their selection is concerned, we are of the view that such selection when it is not of a sitting Judge or retired Judge of a High Court should be done by a high-powered committee with a sitting Judge of the Supreme Court to be nominated by the Chief Justice of India as its Chairman. This will ensure selection of proper and competent people to man these high offices of trust and help to build up reputation and acceptability. Once the qualifications indicated for appointment of Chairman are adopted and the manner of selection of Vice-Chairman and members is followed, we are inclined to think that the manning of the Tribunal would be proper and conducive to appropriate functioning. We do not propose to strike down the prescriptions containing different requirements but would commend to the Central Government to take prompt steps to bring the provisions in accord with what we have indicated. We must state that unless the same be done, the Constitution of the Tribunal as a substitute of the High Court would be open to challenge. We hasten to add that our judgment shall operate prospectively and would not affect appointments already made to the offices of Vice-Chairman and member both administrative and judicial.

22. Section 8 of the Act prescribes the term of office and provides that the term for Chairman, Vice-Chairman or members shall be of five years from the date on which he enters upon his office or until he attains the age of 65 in the case of Chairman or Vice-Chairman and 62 in the case of member, whichever is earlier. The retiring age of 62 or 65 for the different categories is in accord with the pattern and fits into the scheme in comparable situations. We would, however, like to indicate that appointment for a term of five years may occasionally operate as a disincentive for well qualified people to accept the offer to join the Tribunal. There may be competent people belonging to younger age groups who would have more than five years to reach the prevailing age of retirement. The fact that such people would be required to go out on completing the five year period but long before the superannuation age is reached is bound to operate as a deterrent. Those who come to be Chairman, Vice-Chairman or members resign appointments, if any, held by them before joining the Tribunal and, as such, there would be no scope for their return to the place or places from where they come. A five year period is not a long one.

Ordinarily some time would be taken for most of the members to get used to the service jurisprudence and when the period is only five years, many would have to go out by the time they are fully acquainted with the law and have good grip over the job. To require retirement at the end of five years is thus neither convenient to the person selected for the job nor expedient to the scheme. At the hearing, learned Attorney General referred to the case of a member of the Public Service Commission who is appointed for a term and even suffers the disqualification in the matter of further employment. We do not think that is a comparable situation. On the other hand, membership in other high-powered Tribunals like the Income Tax Appellate Tribunal or the Tribunal under the Customs Act can be referred to. When amendments to the Act are undertaken, this aspect of the matter deserves to be considered, particularly because the choice in that event would be wide leaving scope for proper selection to be made.

23. We hope and trust that within a reasonable period not beyond March 31, 1987, the amendments indicated shall be brought about so as to remove the defects found in the Act.

KHALID, OZA AND DUTT, JJ. (*concurring*)—We have read both the judgments just delivered — the main judgment of learned Brother Ranganath Misra and the other of Hon'ble the Chief Justice. We agree with both.

Ed. Connected interim order of the Court in CMP No. 27555 of 1985 (in WP No. 12437 and 12460 of 1985) dated October 1, 1986 is set out below:

ORDER

1. Civil miscellaneous petition is allowed to be amended by adding (1) Mr Shivshankar, 12 Quarters Near Loco Shed, Amla, (2) Mr P.K. Ladsaongikar, Assistant Registrar, High Court of Bombay, Nagpur Bench, Bombay and (3) Mr P.B. Pendharkar, Registrar, Central Administrative Tribunal, New Bombay, as parties respondents to the C.M.P. Issue notice on the C.M.P. returnable on October 20, 1986. Pending notice there will be *ex parte* stay of proceedings in Contempt Petition 64/86 pending before the Nagpur Bench of the Bombay High Court. We may make it clear that our interim order no more than directs the Central Administrative Tribunal to establish a bench at the principal seat of the High Court which we are of the view that so far as Bombay High Court is concerned, would be at Bombay and no other place in Maharashtra.

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(BEFORE P.N. BHAGWATI, C.J. AND RANGANATHI MISRA, J.)

"COMMON CAUSE", A REGISTERED SOCIETY
AND OTHERS

Versus

UNION OF INDIA

.. Petitioners;

.. Respondent.

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SUPREME COURT CASES

1988 Supp SCC

1988 (Supp) Supreme Court Cases 722

(BEFORE SBYASACHI MUKHARJI AND L. M. SHARMA, JJ.)

STATE OF PUNJAB AND OTHERS

.. Appellants ;

Versus

M/s OM PARKASH BALDEV KRISHAN

.. Respondent.

Civil Appeal No. 776 of 1988†, decided on August 23, 1988

Constitution of India — Article 299(1) — Government contract not made on behalf of Governor — Tender for construction of bridge accepted by a letter signed by Executive Engineer, PWD directing the tenderer to attend the office within ten days to sign the agreement which was under preparation — No such agreement signed by the tenderer — Held, Article 299(1) not complied with and hence no valid contract came into existence — No penalty could therefore be levied for non-execution of the work — Government Contracts — Government of India Act, 1935, Section 175(3)

Held :

Article 299(1) is based on public policy. In this case, the Executive Engineer has signed the contract but nowhere in the contract it was offered and accepted or expressed to be made in the name of the Governor. Though the parties were to attend the office within 10 days to sign the agreement which was under preparation but no such agreement was signed. There was, therefore, no valid and binding contract. (Paras 12 and 15)

State of Bihar v. M/s Karam Chand Thapar and Bros. Ltd., (1962) 1 SCR 827 : AIR 1962 SC 110 ; *Seth Bikhraj Jaipuria v. Union of India*, (1962) 2 SCR 880 : AIR 1962 SC 113 ; *Union of India v. A. L. Rallia Ram*, (1964) 3 SCR 164 : AIR 1963 SC 1685 ; *Timber Kashmir Pvt. Ltd. v. Conservator of Forests, Jammu*, (1976) 4 SCC 497 ; (1977) 1 SCR 937 ; *Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh* (1977) 4 SCC 145 : (1978) 1 SCR 375 ; *Mulamchand v. State of M. P.*, (1968) 3 SCR 214 : AIR 1968 SC 1218 and *Union of India v. M/s Hanuman Oil Mills Ltd.*, 1987 Supp SCC 84, relied on

Om Prakash Baldev Krishan v. State of Punjab, (1987) 92 Punj LR 313, affirmed

Appeals dismissed with costs

R-M/8975/S

Advocates who appeared in this case :

C. M. Nayyar, Advocate, for the Appellants ;

Dr. Y. S. Chitale, Senior Advocate (T. V. S. N. Chari, Ms Vrinda Grover and Ms Sunita Rao, Advocates, with him), for the Respondent.

The Judgment of the Court was delivered by

SBYASACHI MUKHARJI, J.—This appeal involves a short question and the field is more or less covered by the constitutional provisions as well as the authorities of this Court. The Executive Engineer (Construction Division No. 1) PWD B & R Branch, Patiala, invited tenders for the work called "Construction of high level bridge over Tangri Nadi in Mile No. 19/5 of Patiala-

†From the Judgment and Order dated July 15, 1987 of the Punjab High Court in Civil Revision No. 1993 of 1986

Pehewa Road". The respondent in response to the said invitation submitted the tender for the aforesaid work, which was opened on October 7, 1975. The Executive Engineer informed the respondent on that date, who happened to be the lowest tenderer and before the tender could be finally considered, that the drawings in triplicate be submitted to the Chief Engineer PWD B & R, Superintendent Engineer, PWD B&R and Executive Engineer Construction Division No. 1 PWD B & R Branch, Patiala. The tender, however, was recalled in February 1976 by the Executive Engineer Construction Division No. 1. The respondent again submitted tender on August 31, 1976. The Executive Engineer informed the respondent telegraphically that the tender submitted by him had been accepted and asked the respondent to take up the work in hand. This was followed by the letter dated August 31, 1976 from the Executive Engineer. It was contended that the telegram as well as the letter mentioned hereinbefore revealed that the tender of the respondent was not accepted by the Governor of Punjab, as it was mandatory under the Constitution in order to amount to a valid acceptance and to create a binding contract between the parties. The respondent, however, withdrew the offer on November 6, 1976. On November 22, 1976 the respondent-contractor in its letter made it clear that no agreement had been signed between the parties. In reply to the letter dated December 1, 1976 from the Executive Engineer, the respondent vide letter dated December 6, 1976 reiterated and repeated that legal infirmity could not be met by the considerations as made by the appellant. But on April 15, 1980, the Executive Engineer intimated the respondent that as he had failed to start the work, he became liable for action under Clause 2 of the agreement. The letter further stated that the Engineer-in-charge on behalf of the Governor of Punjab had levied a penalty of Rs. 2,55,000. The above position, however, was not accepted by the respondent and he advised the appellant to settle the matter in court. The Superintending Engineer PWD B & R Patiala, then forwarded the claim of Rs. 4,56,040 for arbitration and asked the firm to submit the reply in duplicate within 30 days from the issue of the letter. Reply was sent by the respondent to the effect stating that no valid contract in respect of the construction of high level bridge over river in Mile No. 19/5 of Patiala-Pehewa Road, ever came into existence between the parties. The arbitrator again on July 2, 1983 issued a letter after a lapse of one year and the same was replied more or less in the same manner. The respondent filed an application under Section 33 of the Arbitration Act, 1940 (hereinafter called 'the Act'). The learned Sub-Judge 1st Class, Patiala, on April 4, 1986 dismissed the application of the respondent with costs. It was contended before him that there was no valid acceptance of the offer made by the respondent herein and, therefore, there was no valid contract. It was contended that no agreement between the parties as required by law, had been brought into existence. Therefore, there was no question of breach of agreement. The learned Sub-Judge commented that no oral evidence was adduced on behalf of the respondent. The learned Sub-Judge came to the conclusion that there was a valid offer. He observed that the only point that required

consideration was whether the acceptance regarding the allotment of work of construction of high level bridge over river Tangri on Patiala-Pehewa Road was issued on behalf of the Governor of Punjab or not. The learned Judge came to the conclusion after discussing various evidence that the Executive Engineer was authorised to accept tender. He referred to various clauses. The learned Judge noted that it was clearly laid down in the tender itself that the tender together with acceptance thereof would constitute a valid and binding contract between the parties. The relevant condition of the tender, that is, condition No. 4.6 read as follows :

The tender together with letter of acceptance thereof shall constitute a binding contract between the successful tenderer and the department and shall form the foundation of rights and obligations of both the parties.

2. The learned Sub-Judge recorded that the above tender form was duly signed by the respondent and the appellant. On an analysis of the evidence on record, the learned Judge came to the conclusion that there was a valid contract and accordingly the application under Section 33 of the Act was dismissed with costs. There was a revision to the High Court. The High Court after discussing the relevant evidence came to the conclusion that there was no valid contract. The learned Judge of the High Court noted that in the acceptance letter Ex. P. 7 and Ex. RW 1/14, the Executive Engineer had required the respondent at the end to sign the agreement which was under preparation within ten days. No such agreement was ever signed. That position is undisputed. Therefore, the High Court was of the view that no contract in conformity with Article 299(1) of the Constitution, which was a constitutional requirement in this case, has not (*sic*) been entered into and came to the conclusion that there was no contract between the parties. In that view of the matter the revision was allowed and the order passed by the trial Judge was set aside. This appeal arises from the said decision.

3. Shri C. M. Nayar advocate for the appellant contended that there was a valid and subsisting contract. He strenuously argued that there was authority for the Executive Engineer to enter into the contract on behalf of the Governor. He drew our attention to Clause 2.76 of the Public Works Department Code which provided as follows :

2.76. No authority lower than an officer in charge of a Sub-Division can accept any tender or make a contract for public works. The different classes of deeds, contracts and other instruments which may be executed by this department and the authorities empowered to execute them are detailed in Appendix I, while the financial limits up to which these authorities are authorised to determine the terms of deeds, are set forth in the Book of Financial Powers.

4. He also referred to the Appendix I (referred in paragraph 2.76) classifying the deeds, contracts and other instruments. It appears that the Executive Engineer of the buildings and roads was authorised to enter into these contracts. He, therefore, sought to submit that by virtue of that authority if any contract had been entered into then that amounted to entering into contract in accor-

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dance with Article 299(1) of the Constitution. It appears that to understand this problem, it is necessary to deal with some other documents. Our attention was drawn to a letter from the Executive Engineer to the contractor, which stated, inter alia, as follows :

As per your modified lump sum bids received vide your letter No. CM/3-T/OPBK dated March 24, 1976 along with the conditions mentioned in the original tender received vide your letter No. CH/3-T/OPBK/3341/76 dated February 26, 1976 and also further modification of the same as mentioned in your letter No. CM/3-T/OPBK/3503/76 dated March 24, 1976 and letter No. CM/3-T/OPBK/3930/76 dated August 6, 1976, the work of construction of High Level Bridge over Tangri Nadi in Mile No. 19/5 of Patiala Pehewa Road is hereby allotted to you on lump sum basis for an amount of Rs. 25.50 lakhs (Rupees Twenty-five lakhs and fifty thousands) with a time limit of 24 months from the date of issue of this letter coupled with the following conditions :—

5. The said letter thereafter set out those conditions. It is, however, not necessary to set out these. The last two paragraphs of the said letter are relevant and read as follows :

The work may be taken in hand immediately after getting the detailed structural drawing and designs duly approved by this department.

Please attend this office within 10 days to sign your agreement which is under preparation.

6. This was signed by the Executive Engineer and the signatures appeared as follows :

"Sd/-
30/8

Executive Engineer,
Construction Division No. 1,
P.W.D. B&R Br. Patiala.

Endst. No :

Dated :

Copy of above is forwarded to (1) Sub Divisional Engineer, Const. Sub Division No. 5 P.W.D. B&R Br., Patiala for information and necessary action. He is requested to get the work started immediately as per detailed terms and conditions which may be thoroughly studied.

(2) Divisional Acctt. for information & a/a.

Sd/-

Executive Engineer,
Construction Division No. 1,
P.W.D. B&R Br., Patiala.

7. Dr. Chitale appearing for the respondent drew our attention to a letter signed by the Executive Engineer which reads as follows :

Regd. A. D.

Endst. No. 4466

Dated : August 24, 1976

Copy confirmation by post is forwarded to M/s Om Parkash Baldev Krishan, New Delhi-5 for their information and necessary action. Their tender for lump sum amount of rupees thirty-one lakhs and fifty thousands for construction of high level bridge over Markandā river crossing Patiala-

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Pehewa road has been accepted. Please take the work in hand immediately. Regular sanction follows separately.

Sd/-

Executive Engineer

8. Shri R. L. Bansal, Divisional Accountant Construction, in his deposition before the trial court stated that there was no document concerning this contract which had been issued or made in the name of the Governor of Punjab according to the records. He also admitted in his deposition that the letter of acceptance had not been issued in the name of the Governor of Punjab. He reiterated that he was entitled to issue acceptance on behalf of the Governor.

9. It was urged on behalf of the appellants by Shri Nayar that a valid binding contract might come into existence even without a formal agreement duly signed by the parties. According to the learned advocate if one party made an offer in writing and the same was accepted by a letter to the first party, these two documents might be sufficient to spell out a contract. Assuming that it is right, it is not necessary for the purpose of this appeal in the view we have taken to decide that the tender submitted and the letter sent by the Engineer did not create in the facts of this case a binding contract. The acceptance letter, at least, must conform to the requirements of Article 299(1) of the Constitution and since this letter was indisputably not in the name of the Governor, this contention cannot be accepted. The acceptance letter nor any work letter sent to the respondent had been written by the Executive Engineer on behalf of the Governor. Therefore, it is not possible to accept the contention that there was a valid binding contract.

10. Shri Nayar further sought to urge that Article 299 was for the government's protection in order to protect it against unauthorised contracts being entered on behalf of the government. In the instant case, according to Shri Nayar, the Executive Engineer had issued the tender and had accepted the tender, authority to accept the tender on behalf of the Governor, is thus established. Shri Nayar submitted that once that authority is established and it is made clear from the evidence that the authorities have acted on that basis, then it must be presumed that the contract had been entered into in accordance with the provisions of Article 299 of the Constitution. In view of the clear position in law, it is, however, not possible to accept this submission.

11. Clause (1) of Article 299 of the Constitution provides as follows :

(1) All contracts made in the exercise of the executive power of the Union or of a State shall be expressed to be made by the President, or by the Governor of the State, as the case may be, and all such contracts and all assurances of property made in the exercise of that power shall be executed on behalf of the President or the Governor by such persons and in such manner as he may direct or authorise.

12. In this case, the Executive Engineer has signed the contract but nowhere in the contract it was offered and accepted or expressed to be made in the name of the Governor. The constitutional requirement enjoined in

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clause (1) of Article 299 of the Constitution is based on public policy. This position has been made clear by this Court in *State of Bihar v. M/s Karam Chand Thapar & Brothers Ltd*¹. There a dispute between the respondent and the Government of Bihar over the bills for the amount payable to the company in respect of the construction works carried out by it for the government was referred to arbitration. Section 175(3) of the Government of India Act, 1935 provided as follows :

Subject to the provisions of this Act with respect to the Federal Railway Authority, all contracts made in the exercise of the executive authority of the Federation or of a Province shall be, expressed to be made by the Governor-General, or by the Governor of the Province, as the case may be, and all such contracts and all assurances of property made in the exercise of that authority shall be executed on behalf of the Governor-General or Governor by such persons and in such manner as he may direct or authorise.

13. This Court reiterated that under that section a contract entered into by the Governor of a Province must satisfy three conditions, namely, (i) it must be expressed to be made by the Governor ; (ii) it must be executed ; and (iii) the execution should be by such persons and in such manner as the Governor might direct or authorise. These three conditions are required to be fulfilled. This position was reiterated by this Court again in *Seth Bikhraj Jaipuria v. Union of India*². This Court explained that three conditions as mentioned in *State of Bihar v. M/s Karam Chand Thapar*¹ had to be fulfilled, and further reiterated that the object of enacting these provisions was that the State should not be saddled with liability for unauthorised contracts and, hence, it was provided that the contracts must show on their faces that these were made by the Governor-General and executed on his behalf in the manner prescribed by the person authorised. It is based on public policy. No question of waiver arises in such a situation. If once that position is reached, and that position is well settled by the authorities over a long lapse of time, no question of examining the purpose of this requirement arises. In *Union of India v. A. L. Rallia Ram*³ this Court again reiterated that the agreement under arbitration with the government must be in accordance with Section 175(3) of the Government of India Act, 1935. These principles were again reiterated by this Court in *Timber Kashmir Pvt. Ltd. v. Conservator of Forests, Jammu*⁴. There, the court was concerned with Section 122(1) of the Jammu & Kashmir Constitution which corresponded to Article 299(1) of the Constitution of India. In that case all the three applications filed by the respondent State for a reference to an arbitrator under Section 20 of the Jammu & Kashmir Arbitration Act, were dismissed by a Single Judge of the Jammu & Kashmir High Court on the ground that the arbitration clause was, in each case, a part of an agreement which was not duly executed in accordance with the provisions of Section 122(1)

1. (1962) 1 SCR 827: AIR 1962 SC 110
2. (1962) 2 SCR 880: AIR 1962 SC 113
3. (1964) 3 SCR 164: AIR 1963 SC 1685
4. (1977) 1 SCR 937: (1976) 4 SCC 497

of the Jammu & Kashmir Constitution which corresponded to those of Article 299(1) of the Constitution of India. But the Division Bench allowed the appeals holding that if contracts were signed by the Conservator of Forests in compliance with an order of the government, the provisions of Section 122(1) of the Jammu & Kashmir Constitution could not be said to have been infringed. This Court held that the contract could not be executed without the sanction. Nevertheless, if the sanction could be either expressly or impliedly given by or on behalf of the government, as it could, and, if some acts of the government could fasten some obligations upon the government, the lessee could also be estopped from questioning the terms of the grant of the sanction even where there is no written contract executed to bind the lessee. But, once there had been a valid execution of lessee by duly authorised officers, the documents would be the best evidence of sanction. In that case, the contracts were executed on behalf of the Government of Jammu & Kashmir. The only question with which the court was concerned in that case was whether the contracts executed by duly authorised officials had been proved or not. It was held that it was so proved.

14. In *Bihar Eastern Gangetic Fishermen Co-operative Society Ltd. v. Sipahi Singh*⁵ where this Court relied on a previous decision in *Mulamchand v. State of Madhya Pradesh*⁶ and reiterated that there cannot be any question of estoppel or ratification in a case where there is contravention of the provisions of Article 299(1) of the Constitution. The reason is that the provisions of Section 175(3) of the Government of India Act and the corresponding provisions of Article 299(1) of the Constitution have not been enacted for the sake of mere form but they have been enacted for safeguarding the government against unauthorised contracts. The provisions are embodied in Section 175(3) of the Government of India Act and Article 299(1) of the Constitution on the ground of public policy — on the ground of protection of general public . . . and these formalities cannot be waived or dispensed with. This Court again reiterated the three conditions mentioned hereinbefore. The same principle was again reiterated by this Court in *Union of India v. M/s Hanuman Oil Mills Ltd.*⁷

15. In the instant case, we have referred to the letter dated August 31, 1976 which towards the end stated that the parties were to attend the office within 10 days to sign the agreement which is under preparation. It is common ground that no such agreement was signed.

16. In the aforesaid view of the matter the High Court was right in the view it took and the submissions made on behalf of the appellants cannot be entertained. The appeal fails and is accordingly dismissed with costs.

5. (1977) 4 SCC 145; (1978) 1 SCR 375
6. (1968) 3 SCR 214; AIR 1968 SC 1218
7. 1987 Supp SCC 84

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A little later in the same decision this Court said: (SCC p. 295, para 10)

"Since a liberal interpretation of Section 13-A1 of the Act is likely to expose it to a successful challenge on the basis of Article 14 of the Constitution, it has to be read down as conferring benefit only on those members of the armed forces who were landlords of the premises in question while they were in service even though they may avail of it after their retirement. Such a construction would save it from the criticism that it is discriminatory and also would advance the object of enacting it, namely, that members of the armed forces should not while they are in service feel worried about the difficulties of a long drawn out litigation when they wish to get back the premises which they have leased out during their service."

10. In *Malhotra case*¹, this Court was called upon to consider Section 13-A1 of the very Act with which we are now concerned. On the basis of the ratio in *Winifred Ross case*², this Court came to the conclusion that until the landlord satisfied the test that he was a landlord qua the premises and the tenant at the time of his retirement or discharge from service, he would not be entitled to the benefit of Section 13-A of the Act.

11. It is not disputed that the appellant retired on September 30, 1981. On the finding the appellant is right in his submission that this was not a case of transfer with an oblique motive but as the property belonged to a Mitakshara father, upon his death the property has come to his hands. This feature which is different from the facts appearing in the two reported decisions, however, would not persuade us to give a different meaning to the definition in Section 2(hh). In both the cases, for good reason this Court came to the conclusion that the public officer should have been a landlord of the premises in question while in service. Admittedly, the appellant was not the landlord before he superannuated.

12. We are of the view that the opinion of this Court in *Winifred Ross case*² is unassailable and, therefore, the appellant would not be entitled to the benefit of the special procedure in Section 13-A of the Act.

13. The appeal fails and is dismissed. Parties are directed to bear their own costs.

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(BEFORE K.N. SAIKIA AND M. FATHIMA BEEVI, JJ.)

S.M.D. KIRAN PASHA

.. Appellant;

Versus

GOVERNMENT OF ANDHRA PRADESH AND OTHERS .. Respondents.

Criminal Appeal No. 702 of 1989[†], decided on November 9, 1989

[†] From the Judgment and Order dated July 4, 1988 of the Andhra Pradesh High Court in W.P. No. 8610 of 1988

Constitution of India — Articles 226 and 32 — Enforcement of right — Writ petition for protection of right from its threatened or imminent violation maintainable — Pre-violation protection different from post-violation restoration of right — Right can be 'enforced' at both the stages — Where during pendency of writ petition for protection of right under Article 21 from its threatened or imminent violation, petitioner is taken into custody in preventive detention, though released after four days, held, High Court not justified in dismissing the petition and asking the petitioner to first surrender and then move fresh writ petition — Preventive Detention — Words and Phrases — 'Enforcement'

Constitution of India — Articles 226 and 32 — Threatened or imminent violation of right — What amounts to — To be determined on the basis of the alleged overt act

Constitution of India — Articles 226 and 32 — 'Enforcement' of right — Meaning of

Constitution of India — Article 21 — Right under, is reflex of a legal obligation of the rest of the society, including the State

Jurisprudence — Right — Concept of — Conferment of a right on a citizen involves compulsion on rest of the society, including the State not to infringe that right — Analytical positivist concept of right — Claim right in rem and claim-right in personam — Reflex right and private right — Explained — Constitution of India, Part III

Preventive Detention — Approval of State Government — Failure to obtain State Government's approval within statutory period — Held, detention order would cease to be in force after that period — A.P. Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, Section 2(3)

(Para 27)

Preventive Detention — Advisory Board — Reference to — Statutory requirement to refer the case to the Board mandatory — Non compliance with the requirement will result in order ceasing to be in force after the specified period of three months — A.P. Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986 (1 of 1986), Section 10 — Constitution of India, Article 22(7)

According to the appellant he enjoyed popularity in his area and held several important positions in the municipality and in Congress Committee and that the local leadership of a political party having failed to woo him into their fold, he was pressurised through the Excise and police authorities foisting false cases upon him. When the police summoned him for taking photographs like criminals, he filed a writ petition and obtained directions from the High Court. Thereafter the excise authorities it was stated, registered some cases against him but he obtained bail. Scenting a move to detain him under the A.P. Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, he filed a writ petition in the High Court averring inter alia that successive actions initiated against him were a part of political vendetta and sought a direction to the respondents to refrain from making an order detaining him under the provi-

sions of the Act. A Single Judge of the High Court on June 8, 1988 by its interim order directed the respondents not to take the appellant into preventive custody for a period of 15 days. However, on June 10, 1988 the appellant was served the detention order dated June 3, 1988 and he was taken into custody but was released after four days. The appellant filed a miscellaneous petition in the writ petition on June 25, 1988, as an additional affidavit assailing the order of detention. A Division Bench of the High Court held that as the detention order was made even before the writ petition was filed, the prayer in the writ petition had become infructuous; and that there were no extraordinary or special reasons to depart from the normal rule, namely, that in such a case the appellant should first surrender and move for a writ of habeas corpus, and accordingly dismissed the writ petition. Before the Supreme Court in appeal, it was contended on behalf of the appellant that the High Court erred in dismissing the appellant's writ petition holding that there were no extraordinary circumstances or special reasons to depart from the normal rule that the appellant in such a case should first surrender and then move a petition for habeas corpus thereby refusing to grant relief to the appellant against infringement of his fundamental right to liberty; and that the detention order having not been approved by the State Government as required under Section 3(3) of the Act and the appellant's case having not been placed before the Advisory Board as required under Section 10 the detention order ceased to be in force and hence is liable to be quashed. Allowing the appeal the Supreme Court

Held:

Resort to Article 226(1) has been provided inter alia for enforcement of one's right to life and personal liberty guaranteed under Article 21. 'Enforcement' means to impose or compel obedience to law or to compel observance of law. When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State, to observe that right, that is to say, not to act or do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law. When such a right of a person is threatened to be violated or its violation is imminent and the affected person resorts to Article 226, the court can protect observance of his right by restraining those who threaten to violate it. (Para 14)

The protection of the right is to be distinguished from its restoration or remedy after violation. If a threatened invasion of a right is removed by restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right. Thus resort to Article 226 after the right to personal liberty is already violated is different from the pre-violation protection. Post-violation resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of habeas corpus is a post-violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. (Para 14)

What may amount to the threat or imminence of violation is to be determined by the court on the basis of overt acts and the court has to take

action accordingly and not on the basis of internal thoughts. If overt acts towards violation have already been done and the same have come to the knowledge of the person threatened with that violation and he approaches the court under Article 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, the court should call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right. It would not be proper instead to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus. It would, therefore, not be proper for the court to reject the earlier writ petition and tell him that his petition has become infructuous and he had no alternative but to surrender and then petition for a writ of habeas corpus. It would be a challenge to an existing order of detention which is posing an imminent threat to a fundamental right of the named person guaranteed under Article 21. In such an exceptional and rare case detention order already made, and either served or yet to be served, and the person is still free can be legally brought under challenge. (Paras 13 and 14)

Jayantilal Bhagwandas Shah v. State of Maharashtra, (1981) 1 Cri LJ 767: 83 Bom LR 190; *Vedprakash Devkinandan Chirpal v. State of Gujarat*, AIR 1987 Guj 253: (1987) 1 Crimes 440, approved

K.K. Kochunni v. State of Madras, AIR 1959 SC 725: 1959 Supp 2 SCR 316, applied *Special Reference No. 1 of 1964*, AIR 1965 SC 745: (1965) 1 SCR 413; *M.C. Mehta v. Union of India*, (1987) 1 SCC 395: 1987 SCC (L&S) 37, relied on

A.K. Gopalan v. State of Madras, AIR 1950 SC 27: 1950 SCR 88: 51 Cri LJ 1383; *Addl. District Magistrate, Jabalpur v. Shivakant Shukla*, (1976) 2 SCC 521: AIR 1976 SC 1207, referred to

Pandit M.S.M. Sharma v. Sri Krishna Sinha, AIR 1959 SC 395: 1959 Supp 1 SCR 806; *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161: 1984 SCC (L&S) 389: (1984) 2 SCR 67, cited

In the instant case the appellant's fundamental right to liberty is the reflex of a legal obligation of the rest of the society, including the State, and it is the appellant's legal power bestowed upon him to bring about by a legal action the enforcement of the fulfilment of that obligation existing towards him. Denial of the legal action would, therefore amount to denial of his right of enforcement of his right to liberty. A petition for a writ of habeas corpus would not be a substitute for this enforcement. (Para 21)

In such a situation, the Supreme Court would proceed to consider the merits of the case instead of remanding to the High Court to avoid further delay. (Para 22)

The detention order had not been approved by the State Government within 12 days of its being made as required by Section 3(3) of the A.P. Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act. The result is that the order could not remain in force more than 12 days after making thereof and as such must be treated as to have ceased to be in force and non-existent thereafter. (Para 27)

Moreover, the case of the appellant was not at all referred to the Advisory Board as required by Section 10 of the Act and by Article 22. Section 10 prescribes a period of three weeks from the date of detention irrespective of

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whether the person continues to be in detention or not. Therefore, even though the detenu was released, if the detention order was in force, his case was required to be placed before the Advisory Board. This being a mandatory provision and having not been complied with the detention order even if otherwise it was in force, cannot be said to have been in force after three weeks. (Para 29)

R-M/9671/CR

Advocates who appeared in this case:

M.C. Bhandare, Senior Advocate (Ms C.K. Sucharita, Advocate, with him) for the Appellant;

M.S. Ganesh, S. Muralidhar, T.V.S.N. Chari and Raghav, Advocates, for the Respondents.

The Judgment of the Court was delivered by

SAIKIA, J.—Special leave granted.

2. This appeal is from the judgment and order of the High Court of Andhra Pradesh at Hyderabad dated July 4, 1988 passed in Writ Petition No. 8610 of 1988.

3. The appellant states that he enjoys popularity in his area and that he previously held several important positions in the Cuddapah District of Andhra Pradesh, such as organising secretary of the Andhra Pradesh Congress Committee for several years, a Municipal Councillor from 1982 to 1986 and a Vice-Chairman of Cuddapah Municipal Council. According to him in December 1985 he was elected as a Chairman of the Cuddapah Municipal Council for its residuary term and in March 1987 he was elected to the Municipal Council as an independent candidate defeating the Telugu Desam and Congress (I) candidates by a large margin. It is his case that the local leadership of the ruling Telugu Desam party having failed to woo him into their fold he was pressurised through the Excise and Police authorities foisting false cases upon him. On November 13, 1987, the police having summoned him to the police station for taking his photograph as was done in case of criminals, he moved the Andhra Pradesh High Court by Writ Petition No. 79038 of 1987 and the High Court was pleased to issue directions as prayed for, by its order dated December 17, 1987. Thereafter the excise authorities are stated to have registered some cases against the appellant who applied for and was granted bail on May 10, 1988 rejecting the excise authorities' prayer for custody. Scenting a move to detain the appellant under the provisions of the Andhra Pradesh Prevention of Dangerous Activities of Bootleggers, Dacoits, Drug Offenders, Goondas, Immoral Traffic Offenders and Land Grabbers Act, 1986, hereinafter referred to as 'the Act', the appellant filed Writ Petition No. 8610 of 1988 on June 6, 1988 in the Andhra Pradesh High Court averring, inter alia, that the successive actions initiated against him were a part of political vendetta. A learned Single Judge on June 8, 1988 was pleased to direct interim the respondents not to take the appellant into preventive custody for a period of 15 days on the basis of the cases already registered. However, on June 10, 1988 the appellant was served the detention order in S. No.7 of 1988 dated June 3,

1988 as well as the grounds of detention; and he was taken into custody and detained in Secunderabad jail, but was released after four days. The detention order stated that with a view to preventing him from acting in a manner prejudicial to the maintenance of public order, it was necessary to make an order directing that "he shall be detained". The grounds of detention as served upon the appellant contained altogether 13 grounds ranging a period from November 23, 1974 to May 7, 1988.

4. The appellant filed on June 25, 1988 in his writ petition a miscellaneous petition being W.P.M.P. S.R. No. 51830, as an additional affidavit, stating, inter alia, that the writ petition was filed by him seeking a direction to the respondents to refrain from making an order detaining him under the provisions of the Act and the same was admitted and interim direction issued. But thereafter the detention order in S. No. 7 of 1988 dated June 3, 1988 was served on him on June 10, 1988 and, therefore, he submitted the additional affidavit with reference to the impugned order of detention. He assailed therein the grounds of detention as vague, stale, non-existent and, in any case, irrelevant bearing no reasons for the decision that his detention was necessary to prevent him from acting in a manner prejudicial to the maintenance of public order. He also assailed the order on grounds of non-application of mind by respondent 2 and absence of nexus between the grounds and maintenance of public order and of non-disclosure of any rational basis for formation of such an opinion. He refuted and denied each of the 13 grounds and prayed that the writ petition be amended by substituting the prayer so as to issue a writ, order or direction and more particularly one in the nature of writ of mandamus declaring the order of the Collector and District Magistrate respondent 2 herein in S.R. No. 7 of 1988 dated June 3, 1988 made under Act 1 of 1986 as illegal and void and to pass such other orders as are necessary in the interests of justice. Admittedly no specific order was passed on this miscellaneous petition. It appears that a counter-affidavit was filed in the writ petition on behalf of the respondents and the appellant filed a reply affidavit thereto.

5. A Division Bench of the High Court of Andhra Pradesh on reference by the learned Single Judge heard the writ petition analogously with another writ petition and observing, inter alia, that as an order of detention was made even before the writ petition was filed, held that the prayer in the writ petition had become infructuous; and that there were no extraordinary or special reasons to depart from the normal rule, namely, that in such a case the appellant should first surrender and move for a writ of habeas corpus, and accordingly dismissed the writ petition.

6. Mr M.C. Bhandare, the learned counsel for the appellant submits, inter alia, that the High Court erred in dismissing the appellant's writ petition holding that there were no extraordinary circumstances or special reasons to depart from the normal rule that the appellant in such a case should first surrender and then move a petition for habeas corpus

thereby refusing to grant relief to the appellant against infringement of his fundamental right to liberty; and that the grounds of detention were vague, irrelevant, stale and non-existent having no relation to the stated purpose of detention, and there was mala fide exercise of power and complete non-application of mind on the part of the detaining authority for which the grounds of detention ought to have been rejected and the detention order set aside. Counsel relies on a decision of the Bombay High Court in *Jayantilal Bhagwandas Shah v. State of Maharashtra*¹ and one of the Gujarat High Court in *Vedprakash Devkinandan Chiripal v. State of Gujarat*². Counsel further submits that the detention order having not been approved by the State Government as required under Section 3(3) of the Act and the appellant's case having not been placed before the Advisory Board as required under Section 10 the detention order ceased to be in force and hence is liable to be quashed.

7. Mr M.S. Ganesh, the learned counsel for the respondents submits that the detention order having been passed before the writ petition was filed, the High Court was right in dismissing the same following the court's practice and procedure; and that there were no extraordinary or special reasons to depart from the normal rule inasmuch as granting relief at such a stage would defeat the very purpose of the Act. Counsel however, could not deny that the detention order was not approved by the State Government and that the appellant's case was not placed before the Advisory Board.

8. The first question to be decided therefore, is whether the High Court was right in dismissing the writ petition holding that the rule or practice of the High Court in such a case was to interfere only where there were extraordinary or special reasons and otherwise to leave the appellant to first surrender and then move a petition for habeas corpus.

9. From a perusal of the judgment of the High Court it appears that it analysed the question of maintainability of the writ petition from two viewpoints, namely, of the High Court's power, and the High Court's rule or practice. The High Court correctly analysed the power of the High Court to interfere in such a case under Article 226 of the Constitution of India concluding that the High Court had power to interfere. While tracing the High Court's evolving rule or practice, the bench took the view that it was but appropriate and proper that the court evolved and followed a practice and procedure where it would not ordinarily entertain a challenge to a preventive detention unless the person concerned submitted himself to the order and not to encourage persons against whom orders of preventive detention were made by the competent authority under a valid enactment to avoid the process of law and at the same time seek the protection of law from this Court. Relying on several decisions of its own, the court observed :

1 (1981) 1 Cri LJ 767: 83 Bom LR 190

2 AIR 1987 Guj 253: (1987) 1 Crimes 440

"There is no presumption that any and every order of detention is bad. The normal rule shall therefore be "surrender to the order first and then approach this Court". Only in extraordinary cases, where it appears that the State is exercising its power under a preventive detention statute for an oblique purpose, or in an outrageous and/or vindictive manner, or where the order of detention is *ex facie* invalid, would this Court depart from this rule. Now, what would be such extraordinary case cannot and, indeed, should not be defined or specified. It is better left to the sound judgment and decision of this Court."

10. The High Court on facts of the appellant's writ petition, observed that the allegations that the entire administrative machinery was being misused by the local MLA who happened to be a Cabinet Minister to hound the appellant and that the Collector and District Magistrate was being used as a tool were not correct and, therefore, said:

"Once we are of the opinion that there are no extraordinary or special reasons to depart from the normal rule, we will not look into or examine the relevance or correctness of the grounds as we would do in a writ of habeas corpus."

The writ petition was accordingly dismissed.

11. Mr Bhandare submits that when the appellant's fundamental right to liberty was threatened through the machination of a detention order, he approached the High Court for protection and when despite the interim order of the High Court his fundamental right was violated by detaining him, after serving the order of detention on vague, stale, irrelevant and non-existent grounds, though he was released after four days, he ought not to have been denied relief on the ground of there having evolved a practice or procedure of the court not to interfere in such a case except where there were extraordinary or special reasons and to leave the appellant to surrender and then move a petition for habeas corpus. We find force in this submission. As the detention order was already passed and served and the detenu was already taken into custody during the pendency of the writ petition, these subsequent events having been brought to the notice of the court by a miscellaneous application in the form of an additional affidavit — the same ought to have been dealt with by the High Court.

12. In *Jayantilal Bhagwandas Shah v. State of Maharashtra*¹ the challenge was directed towards orders of detention passed under the Conservation of Foreign Exchange and Prevention of Smuggling Activities Act, 1974, but the intended detainees under those orders were not in detention. The State having raised a preliminary objection to the maintainability of the petition on the ground that the habeas corpus jurisdiction under Article 226 of the Constitution was exercisable only to examine the legality of a detention where there was a detention and in no other case, a Division Bench of the Bombay High Court took the view

that though the writ of habeas corpus might be issued only when there was actual illegal detention, that was not to say that an illegal order of detention could not be successfully challenged. In para 11 of the report, the court held:

"Article 226 is couched in language wide enough to protect a person against an illegal invasion of his right to freedom by protecting him while still free and by regaining his freedom for him if he has already been wrongfully detained. We cannot countenance and do not accept the Advocate-General's submission that the High Courts are impotent to give relief against the prospect of illegal detention and must first require the intended detenu to surrender to the illegal detention. We are satisfied that the High Courts may under the provisions of Article 226 issue a direction, order and writ in the nature of mandamus and/or certiorari quashing an illegal order of detention and may by direction, order and writ in the nature of prohibition enjoin the person threatening the illegal detention from executing the threat."

Accordingly the court held that it would intervene to strike down an illegal order of detention. If the court could in matters of personal liberty intervene on the strength of a mere postcard, they surely could intervene on the strength of a petition, though they may seek the wrong relief or be phrased in the wrong form. The position of a person who is actually under illegal detention and of a person who is in imminent jeopardy of illegal detention are not far dissimilar. We are inclined to agree with this view as we feel that refusal to interfere in such a case may amount to denial of the fundamental right itself.

13. A Full Bench of the Gujarat High Court in *Vedprakash Devkinandan Chiripal v. State of Gujarat*² where the petitioner was said to be detained under the provisions of Prevention of Blackmarketing and Maintenance of Supply of Essential Commodities Act, 1980 and the petitioner having absconded, a notification was issued in the official gazette as provided under Section 7(1)(b) of the said Act and the person moved the petition under Article 226 of the Constitution of India praying a writ of habeas corpus or a writ of mandamus, the question was whether the petition would be maintainable before the detenu had been served with order of detention and had been detained in custody, answered the question in the affirmative. Relying on the decisions in *A.K. Gopalan v. State of Madras*³ and *Addl. District Magistrate, Jabalpur v. Shivakant Shukla*⁴, the Full Bench took the view "that before detention, if writ of mandamus is moved for challenging unauthorised detention order which is already passed on the ground that the order is a nullity because it is passed (a) by an incompetent person or (b) it is a mala fide order, or (c) it is contrary to the legal procedure prescribed for passing

3 AIR 1950 SC 27; 1950 SCR 88; 51 Cri LJ 1383

4 (1976) 2 SCC 521; AIR 1976 SC 1207

such order, or (d) it is otherwise a nullity for any other reason, for example, passed against a wrong person, it cannot be said that such challenge would be per se not maintainable..." We are inclined to agree inasmuch as it would be a challenge to an existing order of detention which is posing an imminent threat to a fundamental right of the named person guaranteed under Article 21. There could, therefore, be no reason why in such an exceptional and rare case, detention order already made, and either served or yet to be served, and the person is still free could not be legally brought under challenge.

14. Article 226(1) of the Constitution of India notwithstanding anything in Article 32, empowers the High Court throughout the territories in relation to which it exercises jurisdiction, to issue to any person or authority, including in appropriate cases, any government within those territories directions, orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari, or any of them, for the enforcement of any of the rights conferred by Part III and for any other purpose; and it also envisages making of interim orders, whether by way of injunction or stay or in any other manner in such a proceeding. Article 21 giving protection of life and personal liberty provides that no person shall be deprived of his life or personal liberty except according to procedure established by law. For enforcement of one's right to life and personal liberty resort to Article 226(1) has thus been provided for. What is the ambit of enforcement of the right? The word 'enforcement' has also been used in Article 32 of the Constitution which provides the remedy for enforcement of rights conferred by Part III of the Constitution. The word 'enforcement' has not been defined by the Constitution. According to *Collins English Dictionary* to enforce means to ensure observance of or obedience to a law, decision etc. Enforcement, according to *Webster's Comprehensive Dictionary*, means the act of enforcing, or the state of being enforced, compulsory execution; compulsion. Enforce means to compel obedience to laws; to compel performance, obedience by physical or moral force. If enforcement means to impose or compel obedience to law or to compel observance of law, we have to see what it does precisely mean. The right to life and personal liberty has been guaranteed as a fundamental right and for its enforcement one could resort to Article 226 of the Constitution for issuance of appropriate writ, order or direction. Precisely at what stage resort to Article 226 has been envisaged in the Constitution? When a right is so guaranteed, it has to be understood in relation to its orbit and its infringement. Conferring the right to life and liberty imposes a corresponding duty on the rest of the society, including the State, to observe that right, that is to say, not to act or do anything which would amount to infringement of that right, except in accordance with the procedure prescribed by law. In other words, conferring the right on a citizen involves the compulsion on the rest of the society, including the

State, not to infringe that right. The question is at what stage the right can be enforced? Does a citizen have to wait till the right is infringed? Is there no way of enforcement of the right before it is actually infringed? Can the obligation or compulsion on the part of the State to observe the right be made effective only after the right is violated or in other words can there be enforcement of a right to life and personal liberty before it is actually infringed? What remedy will be left to a person when his right to life is violated? When a right is yet to be violated, but is threatened with violation can the citizen move the court for protection of the right? The protection of the right is to be distinguished from its restoration or remedy after violation. When right to personal liberty is guaranteed and the rest of the society, including the State, is compelled or obligated not to violate that right, and if someone has threatened to violate it or its violation is imminent, and the person whose right is so threatened or its violation so imminent resorts to Article 226 of the Constitution, could not the court protect observance of his right by restraining those who threatened to violate it until the court examines the legality of the action? Resort to Article 226 after the right to personal liberty is already violated is different from the pre-violation protection. Post-violation resort to Article 226 is for remedy against violation and for restoration of the right, while pre-violation protection is by compelling observance of the obligation or compulsion under law not to infringe the right by all those who are so obligated or compelled. To surrender and apply for a writ of habeas corpus is a post-violation remedy for restoration of the right which is not the same as restraining potential violators in case of threatened violation of the right. The question may arise what precisely may amount to threat or imminence of violation. Law surely cannot take action for internal thoughts but can act only after overt acts. If overt acts towards violation have already been done and the same has come to the knowledge of the person threatened with that violation and he approaches the court under Article 226 giving sufficient particulars of proximate actions as would imminently lead to violation of right, should not the court call upon those alleged to have taken those steps to appear and show cause why they should not be restrained from violating that right? Instead of doing so would it be the proper course to be adopted to tell the petitioner that the court cannot take any action towards preventive justice until his right is actually violated whereafter alone he could petition for a writ of habeas corpus? In the instant case when the writ petition was pending in court and the appellant's right to personal liberty happened to be violated by taking him into custody in preventive detention, though he was released after four days, but could be taken into custody again, would it be proper for the court to reject the earlier writ petition and tell him that his petition has become infructuous and he had no alternative but to surrender and then petition for a writ of habeas corpus? The difference of the two situations, as we have seen, have different legal significance. If a threatened invasion of a right is removed by

restraining the potential violator from taking any steps towards violation, the rights remain protected and the compulsion against its violation is enforced. If the right has already been violated, what is left is the remedy against such violation and for restoration of the right.

15. In *K.K. Kochunni v. State of Madras*⁵ where the grievance of the petitioner was that the Madras Marumakkathayam (Removal of Doubts) Act, 1955 (Act 32 of 1955), provided in Section 2 of the Act that notwithstanding any decision of court any Sthanam which fulfilled the conditions stated in the section shall be deemed to be and shall be deemed always to have been properties belonging to the tarwad to which the provisions of the Madras Marumakkathayam Act, 1932 shall apply, and thus, unlike other Acts that contemplated some further action to be taken by the State after the enactment had come into force, automatically took away or abridged a person's fundamental right (as right to property then was) immediately it came into force, a Constitution Bench of this Court speaking through Das, C.J. held that there was no reason why the aggrieved person should not immediately be entitled to seek the remedy under Article 32 of the Constitution. The argument that an application under Article 32 could not be maintained until the State had taken or threatened to take any action under the impugned law which again, if remedy to be taken would infringe the petitioner's fundamental rights, was negated by this Court holding that in cases arising under those enactments the proprietors could invoke the jurisdiction of this Court under Article 32 when the State *did or threatened to do the overt act* (emphasis supplied). It was observed that quite conceivably an enactment may immediately on its coming into force take away or abridge the fundamental rights of a person by its very terms and without any further overt act being done. The impugned Act was said to be an instance of such enactment. In such a case, it was held, the infringement of the fundamental right was complete *eo instanti* the passing of the enactment and, therefore, there could be no reason why the person so prejudicially affected by the law should not be entitled immediately to avail himself of the constitutional remedy under Article 32. It was also observed that to say that a person, whose fundamental right had been infringed by the mere operation of an enactment, was not entitled to invoke the jurisdiction of this Court under Article 32, for the enforcement of his right would be to deny the benefit of a salutary constitutional remedy which was itself his fundamental right. The same reasoning is applicable to the facts of the instant case inasmuch as the detention order was already passed and served and the appellant was already taken into custody and though released after 4 days the government could at any time cancel his release under Section 15 of the Act.

16. In the *Special Reference No. 1 of 1964*⁶, the Constitution Bench speaking through Gajendragadkar, C.J. held (at page 493):

"If a citizen moves this Court and complains that his fundamental right under Article 21 had been contravened, it would plainly be the duty of this Court to examine the merits of the said contention, and that inevitably raises the question as to whether the personal liberty of the citizen has been taken away according to the procedure established by law. In fact, this question was actually considered by this Court in the case of *Pandit Sharma*⁷."

The same law applies to a High Court moved under Article 226 of the Constitution of India against similar contravention.

17. In *M.C. Mehta v. Union of India*⁸ the Constitution Bench speaking through Bhagwati, C.J. said: (SCC pp. 407-08, para 7)

"We are also of the view that this Court under Article 32(1) is free to devise any procedure appropriate for the particular purpose of the proceeding, namely, enforcement of a fundamental right and under Article 32(2) the Court has the implicit power to issue whatever direction, order or writ is necessary in a given case, including all incidental or ancillary power necessary to secure enforcement of the fundamental right. The power of the court is not only injunctive in ambit, that is, preventing the infringement of a fundamental right, but it is also remedial in scope and provides relief against a breach of the fundamental right already committed *vide Bandhua Mukti Morcha case*⁹. If the court were powerless to issue any direction, order or writ in cases where a fundamental right has already been violated, Article 32 would be robbed of all its efficacy, because then the situation would be that if a fundamental right is threatened to be violated, the court can injunct such violation but if the violator is quick enough to take action infringing the fundamental right, he would escape from the net of Article 32. That would, to a large extent, emasculate the fundamental right guaranteed under Article 32 and render it impotent and futile."

18. "Despite the power of the State" says Jean Dabin, "there are always smart people who contrive to violate the laws without incurring the rigours of compulsion; or, again, certain rules are psychologically or technically awkward to apply, so that the machinery of compulsion lends them but insufficient aid. In any case, actual inefficacy or impotence of compulsion can affect the validity of the rule even less than disobedience; that validity binds, and continues to bind, by virtue of the very disposition made by the rule."

⁶ (1965) 1 SCR 413: AIR 1965 SC 745

⁷ *Pandit M.S.M. Sharma v. Sri Krishna Sinha*, 1959 Supp 1 SCR 806: AIR 1959 SC 395,

⁸ (1987) 1 SCC 395: 1987 SCC (L&S) 37

⁹ *Bandhua Mukti Morcha v. Union of India*, (1984) 3 SCC 161: 1984 SCC (L&S) 389: (1984) 2 SCR 67

19. Analytical positivist concept of right has been differently analysed. Hohfeld writing on fundamental legal concepts as applied in judicial reasoning analyses four ideas. One of those is that a right may be a claim-right. *P* has a right to do *X*, it means to indicate that *Q* or every-one else has a duty to let *P* do *X*. The existence of such a duty gives *P* some sort of claim against *Q*. Claim-rights may be either in personam or in rem. A claim-right in personam co-relates to a duty of a person, while claim-rights in rem co-relate to duties in principle incumbent on every-one. A right enjoyed by one thus co-relates to a duty on the part of others.

20. In Hans Kelsen's analysis it is usual to oppose the concept of right to the concept of obligation and to cede priority of rank to the former as we speak of rights and duties. The behaviour of one individual that corresponds to the obligated behaviour of the other is usually designated as a content of a 'right' — as an object of a 'claim' that corresponds to the obligation. "The behaviour of the one individual that corresponds to the obligated behaviour of the other, particularly the claiming of the obligated behaviour, is designated as exercising a right". In case of an obligation to tolerate something, the behaviour of the one corresponding to the obligation of the other is spoken of as 'enjoyment' of the right. According to Kelsen the 'right' or a 'claim' of an individual, is merely the obligation of the other individual or individuals. When we speak of a right as a legally protected interest, in the words of Kelsen, it refers to a right as the "reflex of a legal obligation". Right is often understood as a will power conferred by law. A 'right' in the sense is present if the conditions of the sanction that constitutes a legal obligation includes a motion, normally of the individual in relation to whom the obligation exists; the motion is aimed at the execution of the sanction and has the form of a legal action brought before the law applying organ. Then this organ may apply the general norm to effectuate the right, which is the reflex of the legal obligation by executing the sanction. The right which is the reflex of legal obligation is equipped with the legal power of the entitled individual to bring about by a legal action the execution of a sanction as a reaction against the non-fulfilment of the obligation whose reflex is his right; or as it is sometimes called, the enforcement of the fulfilment of this obligation. To make use of this legal power of motion is exercise of the right. In this sense each right of an individual contains a claim to the behaviour of another individual — namely to that behaviour to which the second individual is obligated toward the first; the behaviour that constitutes the content of the legal obligation identical with the reflex right. If an individual, towards which another individual is obligated to a certain behaviour, does not have the legal power to bring about by a legal action the execution of a sanction as a reaction against the non-fulfilment of the obligation, then the act by which he demands fulfilment of the obligation has no specific legal effect; the act is legally irrelevant, except for not

being legally prohibited. Therefore, a 'claim' as legally effective act exists only when a law exists, which means that an individual has the legal power. The subject of a right may be not only one individual but two or several individuals, including the State.

21. In the language of Kelsen the right of an individual is either a mere reflex right — the reflex of a legal obligation existing towards this individual; or a private right in the technical sense — the legal power bestowed upon an individual to bring about by legal action the enforcement of the fulfilment of an obligation existing toward him, that is, the legal power. From the above analysis it is clear that in the instant case the appellant's fundamental right to liberty is the reflex of a legal obligation of the rest of the society, including the State, and it is the appellant's legal power bestowed upon him to bring about by a legal action the enforcement of the fulfilment of that obligation existing towards him. Denial of the legal action would, therefore, amount to denial of his right of enforcement of his right to liberty. A petition for a writ of habeas corpus would not be a substitute for this enforcement.

22. We, therefore, proceed to consider the merits of this case instead of remanding to the High Court to avoid further delay.

23. Mr Bhandare's submission is that the detention order having not been approved by the State Government under sub-section (3) of Section 3 it had ceased to be in force after 12 days of its being made. We find force in this submission on the facts of the case. Section 3 of the Act provides the power to make detention orders. Sub-section (1) thereof empowers the State Government to make a detention order. Sub-section (2) empowers the State Government to authorise a District Magistrate or a Commissioner of Police to exercise the powers conferred by sub-section (1) during such period as may be specified in the order not exceeding three months at the first instance with power to extend such period from time to time by any period not exceeding three months at any one time. Admittedly, the impugned detention order was passed by the District Magistrate in exercise of powers under Section 2. Sub-section (3) is to the following effect :

"When any order is made under this section by an officer mentioned in sub-section (2), he shall forthwith report the fact to the government together with the grounds on which the order has been made and such other particulars as in his opinion, have a bearing on the matter, and no such order shall remain in force for more than 12 days after the making thereof, unless, in the meantime, it has been approved by the government."

24. Examining the records we find that before the High Court in the miscellaneous case W.P.M.P. S.R. 51830 in the form of an additional affidavit at para 11 it was urged :

"Apart from the infirmities stated above which vitiate the order, statutory requirement of reporting to the government and

obtaining approval of the government within the prescribed time has not been complied with."

25. In the counter-affidavit filed by the Collector and District Magistrate in the High Court to the writ petition as well as the WPMP, there was no reply to para 11 of the WPMP and it was nowhere stated that the detention order was approved by the State Government. In this Court in the special leave petition ground No. V is as follows :

"The Hon'ble High Court has erred in not noting the infirmity in the order of detention inasmuch as the approval of State Government of Andhra Pradesh for the order of the detention made by the District Magistrate, Cuddapah was not obtained within the period of 12 days as enjoined under sub-section (3) of Section 3 of the Act. The order is therefore non est in law."

26. In the counter-affidavit of the Collector and District Magistrate there was not even a whisper in denial of this fact.

27. The learned counsel for the respondents at the hearing could not deny before us that the detention order had not been approved by the government within 12 days. On his request time was granted to produce materials. He has now filed reply affidavit on behalf of the respondents to the rejoinder affidavit filed by the appellant. Scanning this affidavit also we do not find any statement that the detention order was approved. Though the learned counsel submits that it was approved, in view of the above affidavits it cannot be acted upon. We have, therefore, no other alternative than to hold that the detention order had not been approved by the State Government within 12 days of its being made. The result is that the order could not remain in force more than 12 days after making thereof and as such must be treated as to have ceased to be in force and non-existent thereafter.

28. Mr Bhandare then submits that the case of the appellant was not at all referred to the Advisory Board under Section 10 of the Act. This too has not been denied by the learned counsel for the respondents. Section 10 of the Act provides for reference to the Advisory Board and says :

"In every case where a detention order has been made under this Act, the government shall within three weeks from the date of detention of a person under the order, place before the Advisory Board constituted by them under Section 9, the grounds on which the order has been made and the representation, if any, made by the person affected by the order, and in the case where the order has been made by an officer, also the report by such officer under sub-section (3) of Section 3."

29. Section 11 of the Act prescribes the procedure for the Advisory Board. Under sub-section (1) of Section 12, in any case where the Advisory Board has reported that there is, in his opinion sufficient cause for the detention of a person, the government may confirm the detention order and continue the detention of person concerned for such period

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not exceeding the maximum period specified in Section 13 as they think fit. Under sub-section (2) thereof in any case where the Advisory Board has reported that there is, in his opinion, no sufficient cause for the detention of the person concerned, the government shall revoke the detention order and cause the person to be released forthwith. Thus Section 10 makes it mandatory for the government to place the ground on which the order has been made and the representation, if any made by the person affected by the order and in the case where the order has been made by an officer also the report by officer under sub-section (3) of Section 3. This section prescribes a period of three weeks from the date of detention irrespective of whether the person continues to be in detention or not. Therefore, even though the detenu was released, if the detention order was in force, his case was required to be placed before the Advisory Board. This being a mandatory provision and having not been complied with the detention order even if otherwise it was in force, cannot be said to have been in force after three weeks. Under Article 22 of the Constitution of India a person cannot be kept in detention beyond three months without referring his case to an Advisory Board under the appropriate law. In either case the appellant's case having not been referred to an Advisory Board the detention order cannot be said to have remained in force after the statutory period. It is, therefore, not necessary to go into the validity or otherwise of the grounds of detention.

30. In the result we set aside the impugned judgment of the High Court and hold that the detention order ceased to be in force after 12 days of making thereof and even if it was in force it ceased to be in force for failure to refer the appellant's case to the Advisory Board within the time prescribed by law; and accordingly we quash the same. The appeal is accordingly allowed.

31. After the judgment was finalised, another affidavit on behalf of the respondents affirmed by one belonging to the office of the advocate-on-record has been circulated. This affidavit is not acceptable. Even if it was accepted it would not affect the ultimate legal position.

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(BEFORE K. JAGANNATHA SHETTY AND K.N. SAKIA, JJ.)

(Record of Proceedings)

INDERJIT KAUR

.. Petitioner;

Versus

UNION OF INDIA AND OTHERS

.. Respondents.

Writ Petition No. 538 of 1988[†], decided on January 2, 1989

Criminal Procedure Code, 1973 — Section 125 — Constitutionality of —

[†] Under Article 32 of the Constitution of India

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(1994) 6 Supreme Court Cases 632

(BEFORE B.P. JEEVAN REDDY AND SUHAS C. SEN, JJ.)

R. RAJAGOPAL ALIAS R.R. GOPAL AND ANOTHER .. Petitioners;

Versus

STATE OF T.N. AND OTHERS .. Respondents.

Writ Petition (C) No. 422 of 1994†, decided on October 7, 1994

Constitution of India — Arts. 21 and 19(1)(a) & 2 — Right of privacy vis-à-vis freedom of Press — Proper balancing between the two necessary — Publication of life story or biography of a citizen exposing misdeeds of some public officials — Remedies available in case of infringement of right of privacy — Right of privacy — Held, implicit in Art. 21 — Broad principles laid down; further development to be case-by-case — Publication of any matter concerning privacy of a citizen's own as well as of his family, marriage, procreation, motherhood, child-bearing, education etc. without his/her consent would entitle him/her to damages, except where the publication is based on public records including court records, provided it does not pertain to any female victim of sexual assault, kidnap, abduction etc. — However, publication relating to acts or conduct of public officials in discharge of their official duty, unless shown to have been made in reckless disregard for truth, would not entitle the officials to invoke right of privacy and claim damages — Nor the Govt., local authority and other organs and institutions exercising governmental powers entitled to sue for damages — Nor can the Govt. or its officials impose any prior restraint on publication of the matter in question — Relevance of English and American cases — Impact of Arts. 19(1)(a) and (2) on Ss. 499 and 500, IPC not considered — Tort Law — IPC, 1860, Ss. 499 and 500

The first petitioner is the editor, printer and publisher of a Tamil weekly magazine published from Madras and the second petitioner is the associate editor of the weekly. According to them one Auto Shankar (AS for short), who was convicted for six murders and was sentenced to death, had written his autobiography in jail and had handed over the same to his wife with the knowledge and approval of the jail authorities for being delivered to his advocate with the request to publish the same in the petitioners' magazine. The autobiography depicted the close nexus between the prisoner and several IAS, IPS and other officers, some of whom were his partners in several crimes. The petitioners decided to commence serial publication of the autobiography and announced the same in their magazine. Thereupon the Inspector General of Prisons wrote a letter to the first petitioner alleging that the serial in question was not written by AS and asking him to stop publishing the same forthwith. The petitioners then filed writ petition under Article 32 before the Supreme Court to challenge the letter and asserting the freedom of press and their right to publish the book. Neither AS nor his wife were made parties to the writ petition.

On the pleadings in this petition, the following questions arose:

(1) Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(a) entitles the press to publish such unauthorised account of a citizen's

† Under Article 32 of the Constitution of India

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a life and activities and if so to what extent and in what circumstances? What are the remedies open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation?

(2)(a) Whether the Government can maintain an action for its defamation?

(b) Whether the Government has any legal authority to impose prior restraint on the press to prevent publication of material defamatory of its officials? and

b (c) Whether the public officials, who apprehend that they or their colleagues may be defamed, can impose a prior restraint upon the press to prevent such publication?

(3) Whether the prison officials can prevent the publication of the life story of a prisoner on the ground that the prisoner being incarcerated and thus not being in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?

Allowing the writ petition

c Held :

The petitioners have a right to publish, what they allege to be the life story/autobiography of AS insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of AS. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein. However, no opinion need be expressed about the right of the State or its officials to prosecute the petitioners under Sections 499/500 IPC. This is for the reason that even if they are entitled to do so, there is no law under which they can prevent the publication of a material on the ground that such material is likely to be defamatory of them.

(Paras 29, 22 and 23)

New York Times v. United States, 403 US 713 : 29 L Ed 2d 822 (1971), approved

f It is not stated in the counter-affidavit that AS had requested or authorised the prison officials or the Inspector General of Prisons, as the case may be, to adopt appropriate proceedings to protect his right to privacy. If so, the respondents cannot take upon themselves the obligation of protecting his right to privacy. No prison rule was brought to the Court's notice which empowers the prison officials to do so. Moreover, the occasion for any such action arises only after the publication and not before.

(Para 24)

g The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin — (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising — or non-advertising — purposes or for that matter, his life story is written — whether laudatory or otherwise — and published without his consent. In recent times, however, this right has acquired a constitutional status.

(Para 9)

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The freedom of speech flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of torts providing for damages for invasion of the right to privacy and defamation and Sections 499/500 IPC are the existing laws saved under clause (2). But what is called for today — in the present times — is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding — and in the process becoming more inquisitive. Our system of Government demands — as do the systems of Government of the United States of America and United Kingdom — constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, it must be remembered that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system.

(Para 21)

Following broad principles are evolved keeping in mind the above considerations:

(1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

(3) There is yet another exception to the rule in (1) above — indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or

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a media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

b (4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

c (6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media. (Para 26)

d *Kharak Singh v. State of U.P.*, (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cri LJ 329, *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cri) 468; *Olmstead v. United States*, 277 US 438 : 72 L Ed 944 (1927); *Time, Inc. v. Hill*, 385 US 374 : 17 L Ed 2d 456 (1967); *New York Times v. Sullivan*, 376 US 254 : 11 L Ed 2d 686 (1964); *Griswold v. Connecticut*, 381 US 479 : 14 L Ed 2d 510 (1965); *Cox Broadcasting Corp. v. Cohn*, 420 US 469 : 43 L Ed 2d 328 (1975); *Roe v. Wade*, 410 US 113 : 35 L Ed 2d 147 (1973), *Planned Parenthood v. Casey*, 120 L Ed 2d 683 (1992); *Derbyshire County Council v. Times Newspapers Ltd.*, (1993) 2 WLR 449 : (1993) 1 All ER 1011, HL; *Attorney General v. Guardian Newspapers Ltd (No. 2)*, (1990) 1 AC 109 : (1988) 3 All ER 545 : (1988) 3 WLR 776, HL; *Leonard Hector v. Attorney General of Antigua and Barbuda*, (1990) 2 AC 312 : (1990) 2 All ER 103 : (1990) 2 WLR 606, PC, considered

e *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale LJ 920; 26 Stanford Law Rev. 1161; *Privacy and Human Rights*, Ed. AH Robertson, p. 176; *NAACP v. Alabama*, 377 US 288 : 12 L Ed 2d 325 (1964); *Palko v. Connecticut*, 302 US 319; 82 L Ed 288 (1937), *Loving v. Virginia*, 388 US 1 : 18 L Ed 2d 1010 (1967); *Skinner v. Oklahoma*, 316 US 535 : 86 L Ed 1655 (1942); *Eisenstadt v. Baird*, 405 US 438 : 31 L Ed 2d 349 (1972); *Prince v. Massachusetts*, 321 US 158 : 88 L Ed 645 (1944); *Pierce v. Society of Sisters*, 268 US 510 : 69 L Ed 1070 (1925); *Meyer v. Nebraska*, 262 US 390 : 67 L Ed 1042 (1923), cited

f The principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable. This right has to go through a case-by-case development. The concepts dealt with herein are still in the process of evolution. However, the impact of Article 19(1)(a) read with clause (2) thereof on Sections 499 and 500 of Indian Penal Code has not been gone into here. That may have to await a proper case.

g (Paras 27 and 28)

R-M/T/13620/C

Advocates who appeared in this case :

B.D. Sharma, Advocate, for the Petitioners;

A. Manarputham and Ms Aruna Mathur, Advocates, for the Respondents.

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The Judgment of the Court was delivered by

B.P. JEEVAN REDDY, J.— This petition raises a question concerning the freedom of press vis-à-vis the right to privacy of the citizens of this country. It also raises the question as to the parameters of the right of the press to criticise and comment on the acts and conduct of public officials.

2. The first petitioner is the editor, printer and publisher of a Tamil weekly magazine *Nakkheeran*, published from Madras. The second petitioner is the associate editor of the magazine. They are seeking issuance of an appropriate writ, order or direction under Article 32 of the Constitution, restraining the respondents, viz., (1) State of Tamil Nadu represented by the Secretary, Home Department, (2) Inspector General of Prisons, Madras and (3) Superintendent of Prisons (Central Prison), Salem, Tamil Nadu from taking any action as contemplated in the second respondent's communication dated 15-6-1994 and further restraining them from interfering with the publication of the autobiography of the condemned prisoner, Auto Shankar, in their magazine. Certain other reliefs are prayed for in the writ petition but they are not pressed before us.

3. Shankar @ Gauri Shankar @ Auto Shankar was charged and tried for as many as six murders. He was convicted and sentenced to death by the learned Sessions Judge, Chenglepat on 31-5-1991 which was confirmed by the Madras High Court on 17-7-1992. His appeal to this Court was dismissed on 5-4-1994. It is stated that his mercy petition to the President of India is pending consideration.

4. The petitioners have come forward with the following case: Auto Shankar wrote his autobiography running into 300 pages while confined in Chenglepat sub-jail during the year 1991. The autobiography was handed over by him to his wife, Smt Jagdishwari, with the knowledge and approval of the jail authorities, for being delivered to his advocate, Shri Chandrasekharan. The prisoner requested his advocate to ensure that his autobiography is published in the petitioners' magazine, *Nakkheeran*. The petitioners agreed to the same. Auto Shankar affirmed this desire in several letters written to his advocate and the first petitioner. The autobiography sets out the close nexus between the prisoner and several IAS, IPS and other officers, some of whom were indeed his partners in several crimes. The presence of several such officers at the house-warming ceremony of Auto Shankar's house is proved by the video cassette and several photographs taken on the occasion. Before commencing the serial publication of the autobiography in their magazine, the petitioners announced in the issue dated 21-5-1994 that very soon the magazine would be coming out with the sensational life history of Auto Shankar. This announcement sent shock waves among several police and prison officials who were afraid that their links with the condemned prisoner would be exposed. They forced the said prisoner, by applying third degree methods, to write letters addressed to the second respondent (Inspector General of Prisons) and the first petitioner requesting that his life story should not be published in the magazine.

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- Certain correspondence ensued between the petitioners and the prison authorities in this connection. Ultimately, the Inspector General of Prisons
- a (R-2) wrote the impugned letter dated 15-6-1994 to the first petitioner. The letter states that the petitioner's assertion that Auto Shankar had written his autobiography while confined in jail in the year 1991 is false. It is equally false that the said autobiography was handed over by the said prisoner to his wife with the knowledge and approval of the prison authorities. The prisoner has himself denied the writing of any such book. It is equally false that any
- b power of attorney was executed by the said prisoner in favour of his advocate, Shri Chandrasekharan in connection with the publication of the alleged book. If a prisoner has to execute a power of attorney in favour of another, it has to be done in the presence of the prison officials as required by the prison rules; the prison records do not bear out execution of any such power of attorney. The letter concludes:
- c "From the above facts, it is clearly established that the serial in your magazine under the caption 'Shadowed Truth' or 'Auto Shankar's dying declaration' is not really written by Gauri Shankar but it is written by someone else in his name. Writing an article in a magazine in the name of a condemned prisoner is against prison rules and your claim that the power of attorney is given by the prisoner is unlawful. In view of all
- d those it is alleged that your serial supposed to have written by Auto Shankar is (false?) since with an ulterior motive for this above act there will arise a situation that we may take legal action against you for blackmailing. Hence, I request you to stop publishing the said serial forthwith."
- e 5. The petitioners submit that the contents of the impugned letter are untrue. The argument of jeopardy to prisoner's interest is a hollow one. The petitioners have a right to publish the said book in their magazine as desired by the prisoner himself. Indeed, the petitioners have published parts of the said autobiography in three issues of their magazine dated 11-6-1994, 18-6-1994 and 22-6-1994 but stopped further publication in view of the threatening tone of the letter dated 15-6-1994. The petitioners have reasons
- f to believe that the police authorities may swoop down upon their printing press, seize the issues of the magazine besides damaging the press and their properties, with a view to terrorise them. On a previous occasion when the petitioners' magazine published, on 16-8-1991, an investigative report of tapping of telephones of opposition leaders by the State Government, the then editor and publisher were arrested, paraded, jailed and subjected to the
- g third degree methods. There have been several instances when the petitioners' press was raided and substantial damage done to their press and properties. The petitioners are apprehensive that the police officials may again do the same since they are afraid of their links with the condemned prisoner being exposed by the publication of the said autobiography. The petitioners assert the freedom of press guaranteed by Article 19(1)(a), which,
- h according to them, entitles them to publish the said autobiography. It is submitted that the condemned prisoner has also the undoubted right to have

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his life story published and that he cannot be prevented from doing so. It is also stated in the writ petition that before approaching this Court by way of this writ petition, they had approached the Madras High Court for similar reliefs but that the office of the High Court had raised certain objections to the maintainability of the writ petition. A learned Single Judge of the High Court, it is stated, heard the petitioners in connection with the said objections but no orders were passed thereon till the filing of the writ petition. a

6. Respondents 2 and 3 have filed a counter-affidavit, sworn to by Shri T.S. Panchapakcsan, Inspector General of Prisons, State of Tamil Nadu. At the outset, it is submitted that the writ petition filed by the petitioners in the High Court was dismissed by the learned Single Judge on 28-6-1994 holding inter alia that the question whether the said prisoner had indeed written his autobiography and authorised the petitioners to publish the same is a disputed question of fact. This was so held in view of the failure of the learned counsel for the petitioners to produce the alleged letters written by the prisoner to his counsel, or to the petitioners, authorising them to publish his autobiography. It is submitted that the letter dated 15-6-1994 was addressed to the first petitioner inasmuch as "there was a genuine doubt regarding the authorship of the autobiography alleged to have been written by the condemned prisoner while he was in prison and which purportedly reached his wife. Besides, it was also not clear whether the said prisoner had as a matter of fact authorised the petitioner to publish the said autobiography. In the context of such a disputed claim both as to authenticity as well as the authority to publish the said autobiography, the said communication was addressed to the petitioners herein, since the petitioners have threatened to publish derogatory and scurrilous statements purporting to (be?) based on material which are to be found in the disputed autobiography." It is submitted that the allegation that a number of IAS, IPS and other officers patronised the condemned prisoner in his nefarious activities is baseless. "It is only in the context of such a situation coupled with the fact that the petitioner might under the guise of such an autobiography tarnish the image of the persons holding responsible positions in public institution that the communication dated 15-6-1994 was sent to him", say the respondents. They also denied that they subjected the said prisoner to third degree methods to pressurise him into writing letters denying the authorisation to the petitioners to publish his life story. b c d e f

7. Neither Auto Shankar nor his wife — nor his counsel — are made parties to this writ petition. We do not have their version on the disputed question of fact, viz., whether Auto Shankar has indeed written his autobiography and/or whether he had requested or authorised the petitioners to publish the same in their magazine. In this writ petition under Article 32 of the Constitution, we cannot go into such a disputed question of fact. We shall, therefore, proceed on the assumption that the said prisoner has neither written his autobiography nor has he authorised the petitioners to publish the same in their magazine, as asserted by the writ petitioners. We must, g h

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however, make it clear that ours is only an assumption for the purpose of this writ petition and not a finding of fact. The said disputed question may have
a to be gone into, as and when necessary, before an appropriate court or forum, as the case may be.

8. On the pleadings in this petition, following questions arise:

(1) Whether a citizen of this country can prevent another person from writing his life story or biography? Does such unauthorised writing infringe the citizen's right to privacy? Whether the freedom of press guaranteed by Article 19(1)(a) entitles the press to publish such unauthorised account of a citizen's life and activities and if so to what extent and in what circumstances? What are the remedies open to a citizen of this country in case of infringement of his right to privacy and further in case such writing amounts to defamation?
b

(2)(a) Whether the Government can maintain an action for its defamation?
c

(b) Whether the Government has any legal authority to impose prior restraint on the press to prevent publication of material defamatory of its officials? and

(c) Whether the public officials, who apprehend that they or their colleagues may be defamed, can impose a prior restraint upon the press to prevent such publication?
d

(3) Whether the prison officials can prevent the publication of the life story of a prisoner on the ground that the prisoner being incarcerated and thus not being in a position to adopt legal remedies to protect his rights, they are entitled to act on his behalf?

e Question Nos. 1 and 2

9. The right to privacy as an independent and distinctive concept originated in the field of Tort law, under which a new cause of action for damages resulting from unlawful invasion of privacy was recognised. This right has two aspects which are but two faces of the same coin — (1) the general law of privacy which affords a tort action for damages resulting from an unlawful invasion of privacy and (2) the constitutional recognition given to the right to privacy which protects personal privacy against unlawful governmental invasion. The first aspect of this right must be said to have been violated where, for example, a person's name or likeness is used, without his consent, for advertising — or non-advertising — purposes or for that matter, his life story is written — whether laudatory or otherwise — and published without his consent as explained hereinafter. In recent times, however, this right has acquired a constitutional status. We shall proceed to explain how? Right to privacy is not enumerated as a fundamental right in our Constitution but has been inferred from Article 21. The first decision of this Court dealing with this aspect is *Kharak Singh v. State of U.P.*¹ A more elaborate appraisal of this right took place in a later decision in *Gobind v.*
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¹ (1964) 1 SCR 332 : AIR 1963 SC 1295 : (1963) 2 Cr LJ 329

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*State of M.P.*² wherein Mathew, J. speaking for himself, Krishna Iyer and Goswami, JJ. traced the origins of this right and also pointed out how the said right has been dealt with by the United States Supreme Court in two of its well-known decisions in *Griswold v. Connecticut*³ and *Roe v. Wade*⁴. After referring to *Kharak Singh*¹ and the said American decisions, the learned Judge stated the law in the following words: (SCC pp. 155-57, paras 22-29)

"... privacy-dignity claims deserve to be examined with care and to be denied only when an important countervailing interest is shown to be superior. If the Court does find that a claimed right is entitled to protection as a fundamental privacy right, a law infringing it must satisfy the compelling State interest test.

* * *

privacy primarily concerns the individual. It therefore relates to and overlaps with the concept of liberty. The most serious advocate of privacy must confess that there are serious problems of defining the essence and scope of the right. Privacy interest in autonomy must also be placed in the context of other rights and values.

Any right to privacy must encompass and protect the personal intimacies of the home, the family, marriage, motherhood, procreation and child-rearing. This catalogue approach to the question is obviously not as instructive as it does not give analytical picture of the distinctive characteristics of the right of privacy. Perhaps, the only suggestion that can be offered as unifying principle underlying the concept has been the assertion that a claimed right must be a fundamental right implicit in the concept of ordered liberty.

* * *

As Ely says:

There is nothing to prevent one from using the word 'privacy' to mean the freedom to live one's life without governmental interference. But the Court obviously does not so use the term. Nor could it, for such a right is at stake in every case.⁵

There are two possible theories for protecting privacy of home. The first is that activities in the home harm others only to the extent that they cause offence resulting from the mere thought that individuals might be engaging in such activities and that such 'harm' is not constitutionally protectible by the State. The second is that individuals need a place of sanctuary where they can be free from societal control. The importance of such a sanctuary is that individuals can drop the mask, desist for a while from projecting on the world the image they want to be accepted

² (1975) 2 SCC 148 1975 SCC (Cn) 468

³ 381 US 479 14 L. Ed 2d 510 (1965)

⁴ 410 US 113 35 L. Ed 2d 147 (1973)

⁵ See *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 Yale LJ 920, 932

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as themselves, an image that may reflect the values of their peers rather than the realities of their natures.⁶

a The right to privacy in any event will necessarily have to go through a process of case-by-case development. Therefore, even assuming that the right to personal liberty, the right to move freely throughout the territory of India and the freedom of speech create an independent right of privacy as an emanation from them which one can characterize as a fundamental right, we do not think that the right is absolute.

b The European Convention on Human Rights, which came into force on 3-9-1953, represents a valiant attempt to tackle the new problem. Article 8 of the Convention is worth citing⁷:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.

c 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals or for the protection of the rights and freedoms of others."

d Since the right to privacy has been the subject-matter of several decisions in the United States, it would be appropriate to briefly refer to some of the important decisions in that country.

e 10. The right to privacy was first referred to as a right and elaborated in the celebrated article of Warren and Brandies (later Mr Justice Brandies) entitled "*The right to privacy*" published in 4 Harvard Law Review 193, in the year 1890.

f 11. Though the expression "right to privacy" was first referred to in *Olmstead v. United States*⁸, it came to be fully discussed in *Time, Inc. v. Hill*⁹. The facts of the case are these: On a particular day in the year 1952, three escaped convicts intruded into the house of James Hill and held him and members of his family hostage for nineteen hours, whereafter they released them unharmed. The police immediately went after the culprits, two of whom were shot dead. The incident became prime news in the local newspapers and the members of the press started swarming the Hill's home for an account of what happened during the hold-up. The case of the family was that they were not ill-treated by the intruders but the members of the press were not impressed. Unable to stop the siege of the press correspondents, the family shifted to a far-away place. *Life* magazine sent its men to the former home of Hill family where they re-enacted the entire incident, and photographed it, showing inter alia that the members of the

6 See 26 Stanford Law Rev. 1161, 1187

h 7 See *Privacy and Human Rights*, Ed. AH Robertson, p. 176

8 277 US 438 : 72 L Ed 944 (1927)

9 385 US 374 : 17 L Ed 2d 456 (1967)

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family were ill-treated by the intruders. When *Life* published the story, Hill brought a suit against Time Inc., publishers of *Life* magazine, for invasion of his privacy. The New York Supreme Court found that the whole story was "a piece of commercial fiction" — and not a true depiction of the event — and accordingly confirmed the award of damages. However, when the matter was taken to United States Supreme Court, it applied the rule evolved by it in *New York Times Co. v. Sullivan*¹⁰ and set aside the award of damages holding that the jury was not properly instructed in law. It directed a re-trial. Brennan, J. held:

"We hold that the constitutional protections for speech and press preclude the application of the New York statute to redress *false reports* of matters of public interest *in the absence of proof that the defendant published the report with the knowledge of its falsity or in reckless disregard of the truth.*" (emphasis added)

The learned Judge added:

"We create grave risk of serious impairment of the indispensable service of a free press in a free society if we saddle the press with the impossible burden of verifying to a certainty the facts associated in press news articles with a person's name, picture or portrait, particularly as related to non-defamatory matter.

* * *

Those guarantees are not for the benefit of the press so much as for the benefit of all of us. A broadly defined freedom of the press assures the maintenance of our political system and an open society.

* * *

That books, newspapers and magazines are published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded...."

12. The next relevant decision is in *Cox Broadcasting Corp. v. Cohn*¹¹. A Georgia law prohibited and punished the publication of the name of a rape victim. The appellant, a reporter of a newspaper obtained the name of the rape victim from the records of the court and published it. The father of the victim sued for damages. White, J. recognised that "in this sphere of collision between claims of privacy and those of the free press, the interests on both sides are plainly rooted in the traditions and significant concerns of our society" but chose to decide the case on the narrow question whether the press can be said to have violated the said statute or the right to privacy of the victim by publishing her name, having obtained it from public records. The learned Judge held that the press cannot be said to have violated the Georgia law or the right to privacy if it obtains the name of the rape victim from the public records and publishes it. The learned Judge held that the freedom of press to publish the information contained in the public records is

¹⁰ 376 US 254 : 11 L Ed 2d 686 (1964)
¹¹ 420 US 469 : 43 L Ed 2d 328 (1975)

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a of critical importance to the system of Government prevailing in that country and that, may be, in such matters "citizenry is the final judge of the proper conduct of public business".

b 13. Before proceeding further, we may mention that the two decisions of this Court referred to above (*Kharak Singh*¹ and *Gobind*²) as well as the two decisions of the United States Supreme Court, *Griswold*³ and *Roe v. Wade*⁴, referred to in *Gobind*², are cases of governmental invasion of privacy. *Kharak Singh*¹ was a case where the petitioner was put under surveillance as defined in Regulation 236 of the U.P. Police Regulations. It involved secret picketing of the house or approaches to the house of the suspect, domiciliary visits at night, periodical enquiries by police officers into repute, habits, association, income or occupation, reporting by police constables on the movements of the person etc. The regulation was challenged as violative of the fundamental rights guaranteed to the petitioner. A Special Bench of seven learned Judges held, by a majority, that the regulation was unobjectionable except to the extent it authorised domiciliary visits by police officers. Though right to privacy was referred to, the decision turned on the meaning and content of "personal liberty" and "life" in Article 21. *Gobind*² was also a case of surveillance under M.P. Police Regulations. *Kharak Singh*¹ was followed even while at the same time elaborating the right to privacy, as set out hereinbefore.

*Griswold*³ was concerned with a law made by the State of Connecticut which provided a punishment to "any person who uses any medicinal article or instrument for the purpose of preventing ...". The appellant was running a centre at which information and medical advice was given to married persons as to the means of preventing conception. They prescribed contraceptives for the purpose. The appellant was prosecuted under the aforesaid law, which led the appellant to challenge the constitutional validity of the law on the grounds of First and Fourteenth Amendments. Douglas, J., who delivered the main opinion, examined the earlier cases of that court and observed:

f "... specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help to give them life and substance. ... Various guarantees create zones of privacy.

* * *

g The present case, then concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law which, in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon the relationship. Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a "governmental purpose to control or prevent activities constitutionally subject to State regulation may not be achieved by means which sweep unnecessarily broadly and thereby

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invade the area of protected freedoms". *NAACP v. Alabama*¹². Would we allow the police to search the sacred precincts of marital bedrooms of telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.

We deal with a *right of privacy* older than the Bill of Rights — older than our political parties, older than our schools system. Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions."

15. *Roe v. Wade*⁴ concerned the right of an unmarried pregnant woman to terminate her pregnancy by abortion. The relevant Texas law prohibited abortions except with respect to those procured or admitted by medical advice for the purpose of saving the life of the mother. The constitutionality of the said law was questioned on the ground that the said law improperly invaded the right and the choice of a pregnant woman to terminate her pregnancy and therefore violative of 'liberty' guaranteed under Fourteenth Amendment and the right to privacy recognised in *Griswold*³. Blackmun, J. who delivered the majority opinion, upheld the right to privacy in the following words:

"The Constitution does not explicitly mention any *right of privacy*. In a line of decisions, however,... the Court has recognised that a right of personal privacy, or a guarantee of certain areas or zones of privacy, does exist under the Constitution. In varying contexts, the Court or individual Justices have, indeed, found at least the roots of that right in the First Amendment,... in the penumbras of the Bill of Rights,... in the Ninth Amendment,... or in the concept of liberty guaranteed by the first section of the Fourteenth Amendment,... These decisions make it clear that only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty', *Palko v. Connecticut*¹³, are included in this guarantee of personal privacy. They also make it clear that the right has some extension to activities relating to marriage, *Loving v. Virginia*¹⁴; procreation, *Skinner v. Oklahoma*¹⁵; contraception; *Eisenstadt v. Baird*¹⁶; family relationships, *Prince v. Massachusetts*¹⁷; and child-rearing and education, *Pierce v. Society of Sisters*¹⁸, *Meyer v. Nebraska*¹⁹.

12 377 US 288 : 12 L Ed 2d 325 (1964)

13 302 US 319 : 82 L Ed 288 (1937)

14 388 US 1 : 18 L Ed 2d 1010 (1967)

15 316 US 535 : 86 L Ed 1655 (1942)

16 405 US 438 : 31 L Ed 2d 349 (1972)

17 321 US 158 : 88 L Ed 645 (1944)

18 268 US 510 : 69 L Ed 1070 (1925)

19 262 US 390 : 67 L Ed 1042 (1923)

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a This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon State action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

b Though this decision received a few knocks in the recent decision in *Planned Parenthood v. Casey*²⁰, the central holding of this decision has been left untouched — indeed affirmed.

c 16. We may now refer to the celebrated decision in *New York Times v. Sullivan*¹⁰, referred to and followed in *Time Inc. v. Hill*¹¹. The following are the facts: In the year 1960, the New York Times carried a full page paid advertisement sponsored by the "Committee to Defend Martin Luther King and the Struggle for Freedom in the South", which asserted or implied that law-enforcement officials in Montgomery, Alabama, had improperly arrested and harassed Dr King and other civil rights demonstrators on various occasions. Respondent, who was the elected Police Commissioner of Montgomery, brought an action for libel against the *Times* and several of the individual signatories to the advertisement. It was found that some of the assertions contained in the advertisement were inaccurate. The Alabama courts found the defendants guilty and awarded damages in a sum of \$ 500,000, which was affirmed by the Alabama Supreme Court. According to the relevant Alabama law, a publication was "libellous per se" if the words "tend to injure a person ... in his reputation" or to "bring (him) into public contempt". The question raised before the United States Supreme Court was whether the said enactment abridged the freedom of speech and of the press guaranteed by the First and Fourteenth Amendments. In the leading opinion delivered by Brennan, J., the learned Judge referred in the first instance to the earlier decisions of that court emphasising the importance of freedom of speech and of the press and observed:

f "Authoritative interpretations of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth — whether administered by judges, juries, or administrative officials — and especially one that puts the burden of proving the truth on the speaker.

* * *

g A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions — and to do so on pain of libel judgments virtually unlimited in amount—leads to ... "self-censorship". Allowance of the defense of truth, with the burden of proving it on the defendant, does not mean that only false speech will be deterred. Even courts accepting this defense as an adequate safeguard have recognized the difficulties of adducing legal proofs that the alleged libel was true in all its factual particulars. ... Under such a rule, would-be critics of official

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conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so. They tend to make only statements which 'steer far wider of the unlawful zone'.... The rule thus dampens the vigor and limits the variety of public debate. It is inconsistent with the First and Fourteenth Amendments. a

The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' — that is, with knowledge that it was false or with reckless disregard of whether it was false or not. b
(emphasis added)

17. Black, J. who was joined by Douglas, J. concurred in the opinion but on a slightly different ground. He affirmed his belief that "the First and Fourteenth Amendments not merely 'delimit' a State's power to award damages to 'public officials against critics of their official conduct' but completely prohibit a State from exercising such a power". c

18. The principle of the said decision has been held applicable to "public figures" as well. This is for the reason that public figures like public officials often play an influential role in ordering society. It has been held that as a class the public figures have, as the public officials have, access to mass media communication both to influence the policy and to counter-criticism of their views and activities. On this basis, it has been held that the citizen has a legitimate and substantial interest in the conduct of such persons and that the freedom of press extends to engaging in uninhibited debate about the involvement of public figures in public issues and events. d e

19. The principle of *Sullivan*¹⁰ was carried forward — and this is relevant to the second question arising in this case — in *Derbyshire County Council v. Times Newspapers Ltd.*²¹, a decision rendered by the House of Lords. The plaintiff, a local authority brought an action for damages for libel against the defendants in respect of two articles published in *Sunday Times* questioning the propriety of investments made for its superannuation fund. The articles were headed "*Revealed: Socialist tycoon deals with Labour Chief*" and "*Bizarre deals of a council leader and the media tycoon*". A preliminary issue was raised whether the plaintiff has a cause of action against the defendant. The trial Judge held that such an action was maintainable but on appeal the Court of Appeal held to the contrary. When the matter reached the House of Lords, it affirmed the decision of the Court of Appeal but on a different ground. Lord Keith delivered the judgment agreed to by all other learned Law Lords. In his opinion, Lord Keith recalled that in *Attorney General v. Guardian Newspapers Ltd. (No. 2)*²² popularly known as "*Spycatcher case*", the House of Lords had opined that "there are f g

21 (1993) 2 WLR 449; (1993) 1 All ER 1011, HL

22 (1990) 1 AC 109 (1988) 3 All ER 545; (1988) 3 WLR 776, HL h

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- rights available to private citizens which institutions of... Government are not in a position to exercise unless they can show that it is in the public interest to do so". It was also held therein that not only was there no public interest in allowing governmental institutions to sue for libel, it was "contrary to the public interest because to admit such actions would place an undesirable fetter on freedom of speech" and further that action for defamation or threat of such action "inevitably have an inhibiting effect on freedom of speech". The learned Law Lord referred to the decision of the United States Supreme Court in *New York Times v. Sullivan*¹⁰ and certain other decisions of American Courts and observed — and this is significant for our purposes—

- "while these decisions were related most directly to the provisions of the American Constitution concerned with securing freedom of speech, the public interest considerations which underlaid them are no less valid in this country. What has been described as 'the chilling effect' induced by the threat of civil actions for libel is very important. Quite often the facts which would justify a defamatory publication are known to be true, but admissible evidence capable of proving those facts is not available."

Accordingly, it was held that the action was not maintainable in law.

20. Reference in this connection may also be made to the decision of the Judicial Committee of the Privy Council in *Leonard Hector v. Attorney General of Antigua and Barbuda*²³ which arose under Section 33-B of the Public Order Act, 1972 (Antigua and Barbuda). It provided that any person who printed or distributed any false statement which was "likely to cause fear or alarm in or to the public or to disturb the public peace or to undermine public confidence in the conduct of public affairs" shall be guilty of an offence. The appellant, the editor of a newspaper, was prosecuted under the said provision. He took the plea that the said provision contravened Section 12(1) of the Constitution of Antigua and Barbuda which provided that no person shall be hindered in the enjoyment of freedom of expression. At the same time, sub-section (4) of Section 12 stated that nothing contained in or done under the authority of law was to be held inconsistent with or in contravention of sub-section 12(1) to the extent that the law in question made provisions reasonably required in the interest of public order. [These provisions roughly correspond to Articles 19(1)(a) and 19(2) respectively.] The Privy Council upheld the appellant's plea and declared Section 12(1) ultra vires the Constitution. It held that Section 33-B is wide enough to cover not only false statements which are likely to affect public order but also those false statements which are not likely to affect public order. On that account, it was declared to be unconstitutional. The criminal proceedings against the appellant was accordingly quashed. In the course of his speech, Lord Bridge of Harwich observed thus:

- "In a free democratic society it is almost too obvious to need stating that those who hold office in Government and who are responsible for

23 (1990) 2 AC 312 : (1990) 2 All ER 103 : (1990) 2 WLR 606, PC

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public administration must always be open to criticism. Any attempt to stifle or fetter such criticism amounts to political censorship of the most insidious and objectionable kind. At the same time it is no less obvious that the very purpose of criticism levelled at those who have the conduct of public affairs by their political opponents is to undermine public confidence in their stewardship and to persuade the electorate that the opponents would make a better job of it than those presently holding office. In the light of these considerations their Lordships cannot help viewing a statutory provision which criminalises statements likely to undermine public confidence in the conduct of public affairs with the utmost suspicion."

21. *The question is how far the principles emerging from the United States and English decisions are relevant under our constitutional system. So far as the freedom of press is concerned, it flows from the freedom of speech and expression guaranteed by Article 19(1)(a). But the said right is subject to reasonable restrictions placed thereon by an existing law or a law made after the commencement of the Constitution in the interests of or in relation to the several matters set out therein. Decency and defamation are two of the grounds mentioned in clause (2). Law of torts providing for damages for invasion of the right to privacy and defamation and Sections 499/500 IPC are the existing laws saved under clause (2). But what is called for today — in the present times — is a proper balancing of the freedom of press and said laws consistent with the democratic way of life ordained by the Constitution. Over the last few decades, press and electronic media have emerged as major factors in our nation's life. They are still expanding — and in the process becoming more inquisitive. Our system of Government demands — as do the systems of Government of the United States of America and United Kingdom — constant vigilance over exercise of governmental power by the press and the media among others. It is essential for a good Government. At the same time, we must remember that our society may not share the degree of public awareness obtaining in United Kingdom or United States. The sweep of the First Amendment to the United States Constitution and the freedom of speech and expression under our Constitution is not identical though similar in their major premises. All this may call for some modification of the principles emerging from the English and United States decisions in their application to our legal system. The broad principles set out hereinafter are evolved keeping in mind the above considerations. But before we set out those principles, a few more aspects need to be dealt with.*

22. We may now consider whether the State or its officials have the authority in law to impose a prior restraint upon publication of material defamatory of the State or of the officials, as the case may be? We think not. No law empowering them to do so is brought to our notice. As observed in *New York Times v. United States*²⁴, popularly known as the *Pentagon papers case*, "any system of prior restraints of (freedom of) expression comes to this

24 (1971) 403 US 713 : 29 L Ed 2d 822 (1971)

- a Court bearing a heavy presumption against its constitutional validity" and that in such cases, the Government "carries a heavy burden of showing justification for the imposition of such a restraint". We must accordingly hold that no such prior restraint or prohibition of publication can be imposed by the respondents upon the proposed publication of the alleged autobiography of "Auto Shankar" by the petitioners. This cannot be done either by the State or by its officials. In other words, neither the Government nor the officials who apprehend that they may be defamed, have the right to impose a prior restraint upon the publication of the alleged autobiography of Auto Shankar. The remedy of public officials/public figures, if any, will arise only after the publication and will be governed by the principles indicated herein.

- c 23. We must make it clear that we do not express any opinion about the right of the State or its officials to prosecute the petitioners under Sections 499/500 IPC. This is for the reason that even if they are entitled to do so, there is no law under which they can prevent the publication of a material on the ground that such material is likely to be defamatory of them.

Question No. 3

- d 24. It is not stated in the counter-affidavit that Auto Shankar had requested or authorised the prison officials or the Inspector General of Prisons, as the case may be, to adopt appropriate proceedings to protect his right to privacy. If so, the respondents cannot take upon themselves the obligation of protecting his right to privacy. No prison rule is brought to our notice which empowers the prison officials to do so. Moreover, the occasion for any such action arises only after the publication and not before, as indicated hereinabove.

- e 25. Lastly, we must deal with the objection raised by the respondent as to the maintainability of the present writ petition. It is submitted that having filed a writ petition for similar reliefs in the Madras High Court, which was dismissed as not maintainable under a considered order, the petitioners could not have approached this Court under Article 32 of the Constitution. The petitioners, however, did disclose the above fact but they stated that on the date of their filing the writ petition, no orders were pronounced by the Madras High Court. It appears that the writ petition was filed at about the time the learned Single Judge of the Madras High Court pronounced the orders on the office objections. Having regard to the facts and circumstances of the case, we are not inclined to throw out the writ petition on the said ground. The present writ petition can also be and is hereby treated as a special leave petition against the orders of the learned Single Judge of the High Court.

g 26. We may now summarise the broad principles flowing from the above discussion:

- h (1) The right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a "right to be let alone". A citizen has a right to safeguard the privacy of his own,

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his family, marriage, procreation, motherhood, child-bearing and education among other matters. None can publish anything concerning the above matters without his consent — whether truthful or otherwise and whether laudatory or critical. If he does so, he would be violating the right to privacy of the person concerned and would be liable in an action for damages. Position may, however, be different, if a person voluntarily thrusts himself into controversy or voluntarily invites or raises a controversy.

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(2) The rule aforesaid is subject to the exception, that any publication concerning the aforesaid aspects becomes unobjectionable if such publication is based upon public records including court records. This is for the reason that once a matter becomes a matter of public record, the right to privacy no longer subsists and it becomes a legitimate subject for comment by press and media among others. We are, however, of the opinion that in the interests of decency [Article 19(2)] an exception must be carved out to this rule, viz., a female who is the victim of a sexual assault, kidnap, abduction or a like offence should not further be subjected to the indignity of her name and the incident being publicised in press/media.

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(3) There is yet another exception to the rule in (1) above — indeed, this is not an exception but an independent rule. In the case of public officials, it is obvious, right to privacy, or for that matter, the remedy of action for damages is simply not available with respect to their acts and conduct relevant to the discharge of their official duties. This is so even where the publication is based upon facts and statements which are not true, unless the official establishes that the publication was made (by the defendant) with reckless disregard for truth. In such a case, it would be enough for the defendant (member of the press or media) to prove that he acted after a reasonable verification of the facts; it is not necessary for him to prove that what he has written is true. Of course, where the publication is proved to be false and actuated by malice or personal animosity, the defendant would have no defence and would be liable for damages. It is equally obvious that in matters not relevant to the discharge of his duties, the public official enjoys the same protection as any other citizen, as explained in (1) and (2) above. It needs no reiteration that judiciary, which is protected by the power to punish for contempt of court and Parliament and legislatures protected as their privileges are by Articles 105 and 104 respectively of the Constitution of India, represent exceptions to this rule.

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(4) So far as the Government, local authority and other organs and institutions exercising governmental power are concerned, they cannot maintain a suit for damages for defaming them.

(5) Rules 3 and 4 do not, however, mean that Official Secrets Act, 1923, or any similar enactment or provision having the force of law does not bind the press or media.

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(6) There is no law empowering the State or its officials to prohibit, or to impose a prior restraint upon the press/media.

a 27. We may hasten to add that the principles above mentioned are only the broad principles. They are neither exhaustive nor all-comprehending; indeed no such enunciation is possible or advisable. As rightly pointed out by Mathew, J., this right has to go through a case-by-case development. The concepts dealt with herein are still in the process of evolution.

b 28. In all this discussion, we may clarify, we have not gone into the impact of Article 19(1)(a) read with clause (2) thereof on Sections 499 and 500 of the Indian Penal Code. That may have to await a proper case.

c 29. Applying the above principles, it must be held that the petitioners have a right to publish, what they allege to be the life story/autobiography of Auto Shankar insofar as it appears from the public records, even without his consent or authorisation. But if they go beyond that and publish his life story, they may be invading his right to privacy and will be liable for the consequences in accordance with law. Similarly, the State or its officials cannot prevent or restrain the said publication. The remedy of the affected public officials/public figures, if any, is after the publication, as explained hereinabove.

d 30. The writ petition is accordingly allowed in the above terms. No costs.

(1994) 6 Supreme Court Cases 651

(BEFORE M.N. VENKATACHALIAH, C.J. AND M.M. PUNCHHI,
AND S. MOHAN, JJ.)

e TATA CELLULAR .. Appellant;

Versus

UNION OF INDIA .. Respondent.

Civil Appeal Nos. 4947-50 of 1994[†] with Nos. 4951 and 4952 of
1994, decided on July 26, 1994

f A. Administrative Law — Judicial review — Scope — Govt. contracts —
Tenders — State decision/action on must be in consonance with Art. 14 — Only
the decision-making process and not the merits of the decision itself is
reviewable as court does not sit as appellate court while exercising power of
review — Decision/action when open to review — Test — While court cannot
interfere with Govt.'s freedom of contract, invitation of tender and refusal of
g any tender which pertain to policy matter, but whether the decision/action is
vitiating by arbitrariness, unfairness, illegality, irrationality or 'Wednesbury
unreasonableness' i.e. when decision is such as no reasonable person on proper
application of mind could take or procedural impropriety, can be looked into
by court — Test is whether wrong is of such a nature as to require intervention
— If so court would set right the decision-making process — But it would not

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[†] From the Judgment and Order dated 26-2-1993 of the Delhi High Court in C.W. Nos. 4030-32,
4302 of 1992 and 163 of 1993

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(1997) 1 Supreme Court Cases 301

(BEFORE KULDIP SINGH AND S. SAGHIR AHMAD, JJ.)

a PEOPLE'S UNION FOR CIVIL LIBERTIES (PUCL) .. Petitioner;
Versus
UNION OF INDIA AND ANOTHER .. Respondents.

Writ Petition (C) No. 256 of 1991[†], decided on December 18, 1996

b A. Constitution of India — Arts. 21, 19(1)(a) & (2), 14 and 32 — Right to transmit telephone message or hold telephone conversation in privacy — Held, forms part of right to privacy protected by Art. 21 as well as by Art. 17 of International Covenant on Civil and Political Rights — It is also covered by freedom of speech and expression under Art. 19(1)(a) — Telephone tapping by Govt. under S. 5(2) of Telegraph Act amounts to infraction of these Fundamental Rights — Hence it can be resorted to only in accordance with procedure established by law which must be just, fair and reasonable and should fall within the grounds of reasonable restriction permissible under Art. 19(2) — Additionally, interception of telephonic messages permitted by S. 5(2) of the Telegraph Act must conform to the conditions laid down by S. 5(2) for such interception — International Covenant on Civil and Political Rights, 1966, Art. 17 — Universal Declaration of Human Rights, 1948, Art. 12 — Telegraph Act, 1885, Ss. 5(2) & 7(2)(b) — Words and phrases — “Right to privacy”
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B. Constitution of India — Arts. 21 and 51 — Human rights — Art. 21 to be interpreted in conformity with international law viz. Art. 17 of International Covenant on Civil and Political Rights, 1966 — Art. 12 of Universal Declaration of Human Rights, 1948 is also similar to Art. 17 of the 1966 Covenant — Universal Declaration of Human Rights, 1948 — International Covenant on Civil and Political Rights, 1966

e C. Telegraph Act, 1885 — Ss. 5(2) and 7(2)(b) — Interception of telegraphic messages/tapping of telephone conversation — When can be resorted to under S. 5(2) — ‘Occurrence of any public emergency’ or ‘in the interest of public safety’ is condition precedent in addition to existence of any of the grounds under Art. 19(2) — Order recording such satisfaction in writing necessary — ‘Public emergency’ and ‘public safety’ — Meaning — Though substantive provision of S. 5(2) clearly laid down conditions/situations for interception of messages but in absence of rules under S. 7(2)(b) laying down just, fair and reasonable procedure for exercise of power under S. 5(2), rights guaranteed under Arts. 19(1)(a) and 21 cannot be safeguarded — Central Govt. should, therefore, frame the rules — But till such rules are framed, procedural safeguards laid down by Supreme Court for exercise of power under S. 5(2) to be followed — However, prior judicial scrutiny cannot be provided as a procedural safeguard for issuing order for telephone tapping in absence of any provision in that regard in the Act
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D. International Law — Scope — Now no more confined to relations between States but extends to matters of social concern such as health, education, economics as also human rights — Constitution of India, Art. 51

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[†] Under Article 32 of the Constitution of India

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E. International Law — Customary international law — Rules of, if not contrary to municipal law, shall be deemed to be incorporated in domestic law — Constitution of India, Arts. 51, 13, 32 and 226

Held:

Right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law". (Para 17)

Kharak Singh v. State of U.P., (1964) 1 SCR 332. AIR 1963 SC 1295, *Gobind v. State of M.P.*, (1975) 2 SCC 148 : 1975 SCC (Cr) 468, *R. Rajagopal v. State of T.N.*, (1994) 6 SCC 632, *relied on*

Mum v. Illinois, 94 US 113 : 24 L Ed 77 (1877); *Wolf v. Colorado*, 338 US 25 : 93 L Ed 1782 (1949); *Semayne's case*, (1604) 5 Co Rep 91 a, *cited*

The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone conversation is a part of modern man's life. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the procedure established by law. (Para 18)

India is a signatory to the International Covenant on Civil and Political Rights, 1966. Article 17 thereof provides for right of privacy. Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms. Article 17 of the International Covenant does not go contrary to any part of our municipal law. Article 21 of the Constitution has, therefore, to be interpreted in conformity with the international law. (Paras 20 and 26)

Kesavananda Bharati v. State of Kerala, (1973) 4 SCC 225 : 1973 Supp SCR 1; *A.D.M. v. Shivakant Shukla*, (1976) 2 SCC 521; *Jolly George Varghese v. Bank of Cochin*, (1980) 2 SCC 360 : AIR 1980 SC 470, *relied on*

It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law. International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals. (Paras 22 and 21)

Freedom of speech and expression guaranteed under Article 19(1)(a) means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a). (Para 19)

The vires of Section 5(2) has not been seriously challenged in this case. Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non for the application of the provisions of Section 5(2) of the Act. Unless a public emergency has occurred or the interest of

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- a public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone-tapping. Even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone-tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person. (Paras 27 and 28)

Hukam Chand Shyam Lal v. Union of India, (1976) 2 SCC 128, *relied on*

- c The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5(2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order or (v) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so. (Para 29)

- d Section 5(2) of the Act shows that so far the power to intercept messages/ conversations is concerned the section clearly lays down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. "Procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes. (Para 30)

Maneka Gandhi v. Union of India, (1978) 1 SCC 248 : (1978) 2 SCR 621, *relied on*

- e No rules have been framed under Section 7(2)(b) of the Act for providing the precautions to be taken for preventing the improper interception or disclosure of messages. In the absence of just and fair procedure for regulating the exercise of power under Section 5(2) of the Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution of India. (Para 31)

- f Again, in the absence of any provision in the statute, it is not possible to provide for prior judicial scrutiny as a procedural safeguard. It is for the Central Government to make rules under Section 7(2)(b) of the Act. The Act was enacted in the year 1885. The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5(2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act and till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(b) of the Act, it is necessary to lay down

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procedural safeguards for the exercise of power under Section 5(2) so that the right to privacy of a person is protected. (Para 34)

[Accordingly, the Supreme Court issued order and directions in this regard.]

(Para 35)

WP disposed of

R-M/17239/C

Advocates who appeared in this case :

Kapil Sibal and Rajinder Sachar, Senior Advocates (Ms Rashmi Kapadi and Ms Sanjay Pankh, Advocates, with them) for the Petitioner;

Venugopal Reddy, Senior Advocate (P. Parameswaran, Hemant Sharma and Ms Anil Kaliyar, Advocates, with him) for the Respondents.

Chronological list of cases cited

on page(s)

1. (1994) 6 SCC 632, *R. Rajagopal v. State of T.N* 310g
2. (1980) 2 SCC 360 : AIR 1980 SC 470, *Jolly George Varghese v. Bank of Cochin* 312e
3. (1978) 1 SCC 248 : (1978) 2 SCR 621, *Maneka Gandhi v. Union of India* 314f
4. (1976) 2 SCC 521, *A.D.M. v. Shivakant Shukla* 312c
5. (1976) 2 SCC 128, *Hukam Chand Shyam Lal v. Union of India* 313a
6. (1975) 2 SCC 148 : 1975 SCC (Cri) 468, *Gobind v. State of M.P.* 310e-f, 310g-h
7. (1973) 4 SCC 225 : 1973 Supp SCR 1, *Kesavananda Bharati v. State of Kerala* 312b
8. (1964) 1 SCR 332 : AIR 1963 SC 1295, *Kharak Singh v. State of U P.* 308b, 308c-d, 310e, 310g
9. (1604) 5 Co Rep 91 a, *Semayne's case* 309e-f, 309f
10. 338 US 25 : 93 L Ed 1782 (1949), *Wolf v. Colorado* 308g-h, 310b-c
11. 94 US 113 : 24 L Ed 77 (1877), *Munn v. Illinois* 308d

The Judgment of the Court was delivered by

KULDIP SINGH, J.— Telephone-tapping is a serious invasion of an individual's privacy. With the growth of highly sophisticated communication technology, the right to hold telephone conversation, in the privacy of one's home or office without interference, is increasingly susceptible to abuse. It is no doubt correct that every Government, howsoever democratic, exercises some degree of sub rosa operation as a part of its intelligence outfit but at the same time citizen's right to privacy has to be protected from being abused by the authorities of the day.

2. This petition — public interest — under Article 32 of the Constitution of India has been filed by the People's Union of Civil Liberties, a voluntary organisation, highlighting the incidents of telephone-tapping in the recent past. The petitioner has challenged the constitutional validity of Section 5(2) of the Indian Telegraph Act, 1885 (the Act), in the alternative it is contended that the said provisions be suitably read down to include procedural safeguards to rule out arbitrariness and to prevent the indiscriminate telephone-tapping.

3. The writ petition was filed in the wake of the report on "Tapping of politicians' phones" by the Central Bureau of Investigation (CBI). Copy of the report as published in the *Mainstream*, Vol. XXIX dated 26-3-1991 has been placed on record along with the rejoinder filed by the petitioner. The

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authenticity of the report has not been questioned by the learned counsel for the Union of India before us. Paras 21 and 22 of the report are as under:

a "21. Investigation has revealed the following lapses on the part of MTNL

(i) In respect of 4 telephone numbers though they were shown to be under interception in the statement supplied by MTNL, the authorisation for putting the number under interception could not be provided. This shows that records have not been maintained properly.

b (ii) In respect of 279 telephone numbers, although authority letters from various authorised agencies were available, these numbers have not been shown in lists supplied by MTNL showing interception of telephones to the corresponding period. This shows that lists supplied were incomplete.

c (iii) In respect of 133 cases, interception of the phones were done beyond the authorised part. The GM (O), MTNL in his explanation has said that this was done in good faith on oral requests of the representatives of the competent authorities and that instructions have now been issued that interception beyond authorised periods will be done only on receipt of written requests.

d (iv) In respect of 111 cases, interception of telephones have exceeded 180 days' period and no permission of Government for keeping the telephone under interception beyond 180 days was taken.

e (v) The files pertaining to interception have not been maintained properly.

22. Investigation has also revealed that various authorised agencies are not maintaining the files regarding interception of telephones properly. One agency is not maintaining even the logbooks of interception. The reasons for keeping a telephone number on watch have also not been maintained properly. The effectiveness of the results of observation have to be reported to the Government in quarterly returns which is also not being sent in time and does not contain all the relevant information. In the case of agencies other than IB, the returns are submitted to the MHA. The periodicity of maintenance of the records is not uniform. It has been found that whereas DRI keeps record for the last 5 years, in case of IB, as soon as the new quarterly statement is prepared, the old returns are destroyed for reasons of secrecy. The desirability of maintenance of uni-return and periodicity of these documents needs to be examined."

Section 5(2) of the Act is as under:

h "5. (2) On the occurrence of any public emergency, or in the interest of the public safety, the Central Government or a State Government or any officer specially unauthorised in this behalf by the Central Government or a State Government may, if satisfied that it is necessary

or expedient so to do in the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or for preventing incitement to the commission of an offence, for reasons to be recorded in writing, by order, direct that any message or class of messages to or from any person or class of persons, or relating to any particular subject, brought for transmission by or transmitted or received by any telegraph, shall not be transmitted, or shall be intercepted or detained, or shall be disclosed to the Government making the order or an officer thereof mentioned in the order:

Provided that press messages intended to be published in India of correspondents accredited to the Central Government or a State Government shall not be intercepted or detained, unless their transmission has been prohibited under this sub-section."

4. The above provisions clearly indicate that in the event of the occurrence of a public emergency or in the interest of public safety the Central Government or the State Government or any officer specially authorised in this behalf, can intercept messages if satisfied that it is necessary or expedient so to do in the interest of:

- (i) The sovereignty and integrity of India.
- (ii) The security of the State.
- (iii) Friendly relations with foreign States.
- (iv) Public order.

(v) For preventing incitement to the commission of an offence.

5. The CBI report indicates that under the above provisions of law Director Intelligence Bureau, Director General Narcotics Control Bureau, Revenue Intelligence and Central Economic Intelligence Bureau and the Director Enforcement Directorate have been authorised by the Central Government to do interception for the purposes indicated above. In addition, the State Governments generally give authorisation to the Police/Intelligence agencies to exercise the powers under the Act.

6. The Assistant Director General, Department of Telecom has filed counter-affidavit on behalf of the Union of India. The stand taken by the Union of India is as under:

"The allegation that the party in power at the Centre/State or officer authorised to tap the telephone by the Central/State Government could misuse this power is not correct. Tapping of telephone could be done only by the Central/State Government order by the officer specifically authorised by the Central/State Government on their behalf and it could be done only under certain conditions such as national emergency in the interest of public safety, security of State, public order etc. It is also necessary to record the reasons for tapping before tapping is resorted to. If the party, whose telephone is to be tapped is to be informed about this and also the reasons for tapping, it will defeat the very purpose of tapping of telephone. By the very sensitive nature of the work, it is

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a absolutely necessary to maintain secrecy in the matter. In spite of safeguards, if there is alleged misuse of the powers regarding tapping of telephones by any authorised officer, the aggrieved party could represent to the State Government/Central Government and suitable action could be taken as may be necessary. Striking down the provision Section 5(2) of the Indian Telegraph Act, is not desirable as it will jeopardise public interest and security of the State."

b 7. Section 7(2)(b) of the Act which gives rule-making power to the Central Government is as under:

"7. *Power to make rules for the conduct of telegraphs.*—(1) The Central Government may, from time to time, by notification in the Official Gazette, make rules consistent with this Act for the conduct of all or any telegraphs established, maintained or worked by the Government or by the persons licensed under this Act.

c (2) Rules under this section may provide for all or any of the following among other matters, that is to say:

(a) * * *

(b) the precautions to be taken for preventing the improper interception or disclosure of messages."

d No rules have been framed by the Central Government under the provisions quoted above.

e 8. Mr Rajinder Sachar, Senior Advocate, assisted by Mr Sanjay Parikh, vehemently contended that right to privacy is a fundamental right guaranteed under Article 19(1) and Article 21 of the Constitution of India. According to Mr Sachar to save Section 5(2) of the Act from being declared unconstitutional it is necessary to read down the said provision to provide adequate machinery to safeguard the right to privacy. Prior judicial sanction — ex parte in nature — according to Mr Sachar, is the only safeguard, which can eliminate the element of arbitrariness or unreasonableness. Mr Sachar contended that not only the substantive law but also the procedure provided therein has to be just, fair and reasonable.

f 9. While hearing the arguments on 26-9-1995, this Court passed the following order:

g "Mr Parikh is on his legs. He has assisted us in this matter for about half an hour. At this stage, Mr Kapil Sibal and Dr Dhavan, who are present in Court, stated that according to them the matter is important and they being responsible members of the Bar, are duty-bound to assist this Court in a matter like this. We appreciate the gesture. We permit them to intervene in this matter. They need a short adjournment to assist us.

The matter is adjourned to 11-10-1995."

h 10. While assisting this Court Mr Kapil Sibal at the outset stated that in the interest of the security and sovereignty of India and to deal with any other emergency situation for the protection of national interest, messages

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may indeed be intercepted. According to him the core question for determination is whether there are sufficient procedural safeguards to rule out arbitrary exercise of power under the Act. Mr Sibal contended that Section 5(2) of the Act clearly lays down the conditions/situations which are sine qua non for the exercise of the power but the manner in which the said power can be exercised has not been provided. According to him procedural safeguards — short of prior judicial scrutiny — shall have to be read in Section 5(2) of the Act to save it from the vice of arbitrariness. a

11. Both sides have relied upon the seven-Judge Bench judgment of this Court in *Kharak Singh v. State of U.P.*¹ The question for consideration before this Court was whether "surveillance" under Chapter XX of the U.P. Police Regulations constituted an infringement of any of the fundamental rights guaranteed by Part III of the Constitution. Regulation 236(b) which permitted surveillance by "domiciliary visits at night" was held to be violative of Article 21 on the ground that there was no "law" under which the said regulation could be justified. b

12. The word "life" and the expression "personal liberty" in Article 21 were elaborately considered by this Court in *Kharak Singh case*¹. The majority read "right to privacy" as part of the right to life under Article 21 of the Constitution on the following reasoning: c

"We have already extracted a passage from the judgment of Field, J. in *Munn v. Illinois*² US at p. 142, where the learned Judge pointed out that 'life' in the 5th and 14th Amendments of the U.S. Constitution corresponding to Article 21, means not merely the right to the continuance of a person's animal existence, but a right to the possession of each of his organs — his arms and legs etc. We do not entertain any doubt that the word 'life' in Article 21 bears the same signification. Is then the word 'personal liberty' to be construed as excluding from its purview an invasion on the part of the police of the sanctity of a man's home and an intrusion into his personal security and his right to sleep which is the normal comfort and a dire necessity for human existence even as an animal? It might not be inappropriate to refer here to the words of the preamble to the Constitution that it is designed to 'assure the dignity of the individual' and therefore of those cherished human values as the means of ensuring his full development and evolution. We are referring to these objectives of the framers merely to draw attention to the concepts underlying the Constitution which would point to such vital words as 'personal liberty' having to be construed in a reasonable manner and to be attributed that sense which would promote and achieve those objectives and by no means to stretch the meaning of the phrase to square with any preconceived notions or doctrinaire constitutional theories. Frankfurter, J. observed in *Wolf v. Colorado*³: d

¹ (1964) 1 SCR 332 AIR 1963 SC 1295

² 94 US 113 24 LEd 77 (1877)

³ 338 US 25 93 LEd 1782 (1949)

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a 'The security of one's privacy against arbitrary intrusion by the police ... is basic to a free society. It is therefore implicit in 'the concept of ordered liberty' and as such enforceable against the States through the Due Process Clause. The knock at the door, whether by day or by night, as a prelude to a search, without authority of law but solely on the authority of the police, did not need the commentary of recent history to be condemned as inconsistent with the conception of human rights enshrined in the history and the basic constitutional documents of English-speaking peoples We have no hesitation in saying that were a State affirmatively to sanction such police incursion into privacy it would run counter to the guaranty of the Fourteenth Amendment.'

b Murphy, J. considered that such invasion was against 'the very essence of a scheme of ordered liberty'.

c It is true that in the decision of the U.S. Supreme Court from which we have made these extracts, the Court had to consider also the impact of a violation of the Fourth Amendment which reads:

d 'The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.'

e and that our Constitution does not in terms confer any like constitutional guarantee. Nevertheless, these extracts would show that an unauthorised intrusion into a person's home and the disturbance caused to him thereby, is as it were the violation of a common law right of a man — an ultimate essential of ordered liberty, if not of the very concept of civilisation. An English Common Law maxim asserts that 'every man's house is his castle' and in *Semayne case*⁴, where this was applied, it was stated that 'the house of everyone is to him as his castle and fortress as well as for his defence against injury and violence as for his repose'. We are not unmindful of the fact that *Semayne case*⁴ was concerned with the law relating to executions in England, but the passage extracted has a validity quite apart from the context of the particular decision. It embodies an abiding principle which transcends mere protection of property rights and expounds a concept of 'personal liberty' which does not rest on any element of feudalism or on any theory of freedom which has ceased to be of value.

g In our view clause (b) of Regulation 236 is plainly violative of Article 21 and as there is no 'law' on which the same could be justified it must be struck down as unconstitutional."

h 13. Subba Rao, J. (as the learned Judge then was) in his minority opinion also came to the conclusion that right to privacy was a part of Article 21 of

⁴ *Semayne's case*, (1604) 5 Co Rep 91 a

the Constitution but went a step further and struck down Regulation 236 as a whole on the following reasoning:

"Further, the right to personal liberty takes in not only a right to be free from restrictions placed on his movements, but also free from encroachments on his private life. It is true our Constitution does not expressly declare a right to privacy as a fundamental right, but the said right is an essential ingredient of personal liberty. Every democratic country sanctifies domestic life; it is expected to give him rest, physical happiness, peace of mind and security. In the last resort, a person's house, where he lives with his family, is his 'castle': it is his rampart against encroachment on his personal liberty. The pregnant words of that famous Judge, Frankfurter J., in *Wolf v. Colorado*³, pointing out the importance of the security of one's privacy against arbitrary intrusion by the police, could have no less application to an Indian home as to an American one. If physical restraints on a person's movements affect his personal liberty, physical encroachments on his private life would affect it in a larger degree. Indeed, nothing is more deleterious to a man's physical happiness and health than a calculated interference with his privacy. We would, therefore, define the right of personal liberty in Article 21 as a right of an individual to be free from restrictions or encroachments on his person, whether those restrictions or encroachments are directly imposed or indirectly brought about by calculated measures. If so understood, all the acts of surveillance under Regulation 236 infringe the fundamental right of the petitioner under Article 21 of the Constitution."

14. Article 21 of the Constitution has, therefore, been interpreted by all the seven learned Judges in *Kharak Singh case*¹ (majority and the minority opinions) to include that "right to privacy" as a part of the right to "protection of life and personal liberty" guaranteed under the said Article.

15. In *Gobind v. State of M.P.*⁵ a three-Judge Bench of this Court considered the constitutional validity of Regulations 855 and 856 of the Madhya Pradesh Police Regulations which provided surveillance by way of several measures indicated in the said regulations. This Court upheld the validity of the regulations by holding that Article 21 was not violated because the impugned regulations were "procedure established by law" in terms of the said Article.

16. In *R. Rajagopal v. State of T.N.*⁶ Jeevan Reddy, J. speaking for the Court observed that in recent times right to privacy has acquired constitutional status. The learned Judge referred to *Kharak Singh case*¹, *Gobind case*⁵ and considered a large number of American and English cases and finally came to the conclusion that "the right to privacy is implicit in the right to life and liberty guaranteed to the citizens of this country by Article 21. It is a 'right to be let alone'." A citizen has a right "to safeguard the

⁵ (1975) 2 SCC 148 : 1975 SCC (Cr) 468

⁶ (1994) 6 SCC 632

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privacy of his own, his family, marriage, procreation, motherhood, child-bearing and education among other matters".

a 17. We have, therefore, no hesitation in holding that right to privacy is a part of the right to "life" and "personal liberty" enshrined under Article 21 of the Constitution. Once the facts in a given case constitute a right to privacy, Article 21 is attracted. The said right cannot be curtailed "except according to procedure established by law".

b 18. The right to privacy — by itself — has not been identified under the Constitution. As a concept it may be too broad and moralistic to define it judicially. Whether right to privacy can be claimed or has been infringed in a given case would depend on the facts of the said case. But the right to hold a telephone conversation in the privacy of one's home or office without interference can certainly be claimed as "right to privacy". Conversations on the telephone are often of an intimate and confidential character. Telephone c conversation is a part of modern man's life. It is considered so important that more and more people are carrying mobile telephone instruments in their pockets. Telephone conversation is an important facet of a man's private life. Right to privacy would certainly include telephone conversation in the privacy of one's home or office. Telephone-tapping would, thus, infract Article 21 of the Constitution of India unless it is permitted under the d procedure established by law.

e 19. Right to freedom of speech and expression is guaranteed under Article 19(1)(a) of the Constitution. This freedom means the right to express one's convictions and opinions freely by word of mouth, writing, printing, picture, or in any other manner. When a person is talking on telephone, he is exercising his right to freedom of speech and expression. Telephone-tapping unless it comes within the grounds of restrictions under Article 19(2) would infract Article 19(1)(a) of the Constitution.

20. India is a signatory to the International Covenant on Civil and Political Rights, 1966. Article 17 of the said covenant is as under:

"Article 17

f 1. No one shall be subject to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to lawful attacks on his honour and reputation.

2. Everyone has the right to the protection of the law against such interference or attacks."

g Article 12 of the Universal Declaration of Human Rights, 1948 is almost in similar terms.

h 21. International law today is not confined to regulating the relations between the States. Scope continues to extend. Today matters of social concern, such as health, education and economics apart from human rights fall within the ambit of International Regulations. International law is more than ever aimed at individuals.

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22. It is almost an accepted proposition of law that the rules of customary international law which are not contrary to the municipal law shall be deemed to be incorporated in the domestic law.

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23. Article 51 of the Constitution directs that the State shall endeavour to inter alia, foster respect for international law and treaty obligations in the dealings of organised peoples with one another. Relying upon the said Article, Sikri, C.J. in *Kesavananda Bharati v. State of Kerala*⁷ observed as under: (SCC p. 333, para 151)

"... it seems to me that, in view of Article 51 of the directive principles, this Court must interpret language of the Constitution, if not intractable, which is after all a municipal law, in the light of the United Nations Charter and the solemn declaration subscribed to by India."

24. In *A.D.M. v. Shivakant Shukla*⁸ Khanna J. in his minority opinion observed as under: (SCC p. 754, para 542)

"Equally well established is the rule of construction that if there be a conflict between the municipal law on one side and the international law or the provisions of any treaty obligations on the other, the courts would give effect to municipal law. If, however, two constructions of the municipal law are possible, the courts should lean in favour of adopting such construction as would make the provisions of the municipal law to be in harmony with the international law or treaty obligations. Every statute, according to this rule, is interpreted, so far as its language permits, so as not to be inconsistent with the comity of nations, or the established rules of international law, and the court will avoid a construction which would give rise to such inconsistency unless compelled to adopt it by plain and unambiguous language."

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25. In *Jolly George Varghese v. Bank of Cochin*⁹ Krishna Iyer, J. posed the following question:

"From the perspective of international law the question posed is whether it is right to enforce a contractual liability by imprisoning a debtor in the teeth of Article 11 of the International Covenant on Civil and Political Rights. The Article reads:

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No one shall be imprisoned merely on the ground of inability to fulfil a contractual obligation." (emphasis added)

The learned Judge interpreted Section 51 of the Code of Civil Procedure consistently with Article 11 of the International Covenant.

26. Article 17 of the International Covenant — quoted above — does not go contrary to any part of our municipal law. Article 21 of the Constitution has, therefore, been interpreted in conformity with the international law.

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27. Learned counsel assisting us in this case have not seriously challenged the constitutional vires of Section 5(2) of the Act. In this respect

7 (1973) 4 SCC 225 : 1973 Supp SCR 1

8 (1976) 2 SCC 521

9 (1980) 2 SCC 360 AIR 1980 SC 470

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it would be useful to refer to the observations of this Court in *Hukam Chand Shyam Lal v. Union of India*¹⁰: (SCC pp. 131-32, para 13)

- a "Section 5(1) if properly construed, does not confer unguided and unbridled power on the Central Government/State Government/specially authorised officer to take possession of any telegraph. Firstly, the occurrence of a 'public emergency' is the sine qua non for the exercise of power under this section. As a preliminary step to the exercise of further jurisdiction under this section the Government or the authority concerned must record its satisfaction as to the existence of such an emergency. Further, the existence of the emergency which is a prerequisite for the exercise of power under this section, must be a 'public emergency' and not any other kind of emergency. The expression 'public emergency' has not been defined in the statute, but contours broadly delineating its scope and features are discernible from the section which has to be read as a whole. In sub-section (1) the phrase 'occurrence of any public emergency' is connected with and is immediately followed by the phrase 'or in the interests of the public safety'. These two phrases appear to take colour from each other. In the first part of sub-section (2) those two phrases again occur in association with each other, and the context further clarifies with amplification that a public 'emergency' within the contemplation of this section is one which raises problems concerning the interest of the public safety, the sovereignty and integrity of India, the security of the State, friendly relations with foreign States or public order or the prevention of incitement to the commission of an offence. It is in the context of these matters that the appropriate authority has to form an opinion with regard to the occurrence of a 'public emergency' with a view to taking further action under this section. Economic emergency is not one of those matters expressly mentioned in the statute. Mere 'economic emergency' — as the High Court calls it — may not necessarily amount to a 'public emergency' and justify action under this section unless it raises problems relating to the matters indicated in the section."

- f As mentioned above, the primary contention raised by the learned counsel is to lay down necessary safeguards to rule out the arbitrary exercise of power under the Act.

- g 28. Section 5(2) of the Act permits the interception of messages in accordance with the provisions of the said section. "Occurrence of any public emergency" or "in the interest of public safety" are the sine qua non for the application of the provisions of Section 5(2) of the Act. Unless a public emergency has occurred or the interest of public safety demands, the authorities have no jurisdiction to exercise the powers under the said section. Public emergency would mean the prevailing of a sudden condition or state of affairs affecting the people at large calling for immediate action. The expression "public safety" means the state or condition of freedom from

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danger or risk for the people at large. When either of these two conditions are not in existence, the Central Government or a State Government or the authorised officer cannot resort to telephone-tapping even though there is satisfaction that it is necessary or expedient so to do in the interests of sovereignty and integrity of India etc. In other words, even if the Central Government is satisfied that it is necessary or expedient so to do in the interest of the sovereignty and integrity of India or the security of the State or friendly relations with sovereign States or public order or for preventing incitement to the commission of an offence, it cannot intercept the messages or resort to telephone-tapping unless a public emergency has occurred or the interest of public safety or the existence of the interest of public safety requires. Neither the occurrence of public emergency nor the interest of public safety are secretive conditions or situations. Either of the situations would be apparent to a reasonable person.

29. The first step under Section 5(2) of the Act, therefore, is the occurrence of any public emergency or the existence of a public safety interest. Thereafter the competent authority under Section 5(2) of the Act is empowered to pass an order of interception after recording its satisfaction that it is necessary or expedient so to do in the interest of (i) sovereignty and integrity of India, (ii) the security of the State, (iii) friendly relations with foreign States, (iv) public order or (v) for preventing incitement to the commission of an offence. When any of the five situations mentioned above to the satisfaction of the competent authority require then the said authority may pass the order for interception of messages by recording reasons in writing for doing so.

30. The above analysis of Section 5(2) of the Act shows that so far the power to intercept messages/conversations is concerned the section clearly lays down the situations/conditions under which it can be exercised. But the substantive law as laid down in Section 5(2) of the Act must have procedural backing so that the exercise of power is fair and reasonable. The said procedure itself must be just, fair and reasonable. It has been settled by this Court in *Maneka Gandhi v. Union of India*¹¹ that "procedure which deals with the modalities of regulating, restricting or even rejecting a fundamental right falling within Article 21 has to be fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself". Thus understood, "procedure" must rule out anything arbitrary, freakish or bizarre. A valuable constitutional right can be canalised only by civilised processes.

31. We are of the view that there is considerable force in the contention of Mr Rajinder Sachar, Mr Kapil Sibal and Dr Rajeev Dhavan that no procedure has been prescribed for the exercise of the power under Section 5(2) of the Act. It is not disputed that no rules have been framed under Section 7(2)(b) of the Act for providing the precautions to be taken for preventing the improper interception or disclosure of messages. In the absence of just and fair procedure for regulating the exercise of power under

¹¹ (1978) 1 SCC 248 - (1978) 2 SCR 621

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a Section 5(2) of the Act, it is not possible to safeguard the rights of the citizens guaranteed under Articles 19(1)(a) and 21 of the Constitution of India. The CBI investigation has revealed several lapses in the execution of the orders passed under Section 5(2) of the Act. Paras 21 and 22 of the report have already been quoted in the earlier part of this judgment.

32. The Second Press Commission in paras 164, 165 and 166 of its report has commented on the "tapping of telephones" as under:

"Tapping of Telephones

b 164. It is felt in some quarters, not without reason, that not infrequently the Press in general and its editorial echelons in particular have to suffer tapping of telephones.

c 165. Tapping of telephones is a serious invasion of privacy. It is a variety of technological eavesdropping. Conversations on the telephone are often of an intimate and confidential character. The relevant statute, i.e., Indian Telegraph Act, 1885, a piece of ancient legislation, does not concern itself with tapping. Tapping cannot be regarded as a tort because the law as it stands today does not know of any general right to privacy.

d 166. This is hardly a satisfactory situation. There are instances where apprehensions of disclosure of sources of information as well as the character of information may result in constraints on freedom of information and consequential drying up of its source. We, therefore, recommend that telephones may not be tapped except in the interest of national security, public order, investigation of crime and similar objectives, under orders made in writing by the Minister concerned or an officer of rank to whom the power in that behalf is delegated. The order should disclose reasons. An order for tapping of telephones should expire after three months from the date of the order. Moreover, within a period of six weeks the order should come up for review before a Board constituted on the lines prescribed in statutes providing for preventive detention. It should be for the Board to decide whether tapping should continue any longer. The decision of the Board should be binding on the Government. It may be added that the Minister or his delegates will be competent to issue a fresh order for tapping of the telephone if circumstances call for it. The Telegraph Act should contain a clause to give effect to this recommendation."

e f 33. While dealing with Section 5(2) of the Act, the Second Press Commission gave the following suggestions regarding "public emergency" and "interest of public safety":

g h "160. It may be noticed that the *public emergency* mentioned in the sub-section is not an objective fact. Some public functionary must determine its existence and it is on the basis of the existence of a *public emergency* that an authorised official should exercise the power of withholding transmission of telegrams. We think that the appropriate Government should declare the existence of the *public emergency* by a

notification warranting the exercise of this power and it is only after the issue of such a notification that the power of withholding telegraphic messages should be exercised by the delegated authority. When such a notification is issued, the principal officer of the telegraph office can be required to submit to the District Magistrate, whom we consider to be the proper person to be the delegate for exercising this power, such telegrams brought for transmission which are likely to be prejudicial to the interest sought to be protected by the sub-section. Thereupon the District Magistrate should pass an order in writing withholding or allowing the transmission of the telegram. We are suggesting the safeguard of a prior notification declaring the existence of a public emergency because the power of interception is a drastic power and we are loath to leave the determination of the existence of a public emergency in the hands of a delegate.

We are of the view that whenever the power is exercised in the interest of public safety, it should, as far as possible, be exercised by the Minister concerned of the appropriate Government for one month at a time extendible by Government if the emergency continues. However, in exceptional circumstances the power can be delegated to the District Magistrate.

163. We also think that as soon as an order is passed by the District Magistrate withholding the transmission of a telegraphic message, it should be communicated to the Central or State Government, as the case may be, and also to the sender and the addressee of the telegram. The text of the order should be placed on the table of the respective State Legislatures after three months. We recommend that, as suggested by the Press Council of India in its annual report covering 1969, the officer in charge of a telegraph office should maintain a register giving particulars of the time of receipt, the sender and addressee of every telegram which he refers to the District Magistrate with recommendation of its withholding. Similarly, the District Magistrate should maintain a register of the time receipt, content and addressee of each telegram and record his decision thereon, together with the time of the decision. Data of this nature will help courts, if called upon, to determine the presence or absence of mala fide in the withholding of telegrams."

According to Mr Sachar the only way to safeguard the right of privacy of an individual is that there should be prior judicial scrutiny before any order for telephone-tapping is passed under Section 5(2) of the Act. He states that such judicial scrutiny may be ex parte. Mr Sachar contended that the judicial scrutiny alone would take away the apprehension of arbitrariness or unreasonableness of the action. Mr Kapil Sibal, on the other hand, has suggested various other safeguards — short of prior judicial scrutiny — based on the law on the subject in England as enacted by the Interception of the Communications Act, 1985.

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34. We agree with Mr Sibal that in the absence of any provision in the statute, it is not possible to provide for prior judicial scrutiny as a procedural safeguard. It is for the Central Government to make rules under Section 7 of the Act. Section 7(2)(b) specifically provides that the Central Government may make rules laying down the precautions to be taken for preventing the improper interception or disclosure of messages. The Act was enacted in the year 1885. The power to make rules under Section 7 of the Act has been there for over a century but the Central Government has not thought it proper to frame the necessary rules despite severe criticism of the manner in which the power under Section 5(2) has been exercised. It is entirely for the Central Government to make rules on the subject but till the time it is done the right to privacy of an individual has to be safeguarded. In order to rule out arbitrariness in the exercise of power under Section 5(2) of the Act and till the time the Central Government lays down just, fair and reasonable procedure under Section 7(2)(b) of the Act, it is necessary to lay down procedural safeguards for the exercise of power under Section 5(2) of the Act so that the right to privacy of a person is protected.

35. We, therefore, order and direct as under:

1. An order for telephone-tapping in terms of Section 5(2) of the Act shall not be issued except by the Home Secretary, Government of India (Central Government) and Home Secretaries of the State Governments. In an urgent case the power may be delegated to an officer of the Home Department of the Government of India and the State Governments not below the rank of Joint Secretary. Copy of the order shall be sent to the Review Committee concerned within one week of the passing of the order.
2. The order shall require the person to whom it is addressed to intercept in the course of their transmission by means of a public telecommunication system, such communications as are described in the order. The order may also require the person to whom it is addressed to disclose the intercepted material to such persons and in such manner as are described in the order.
3. The matters to be taken into account in considering whether an order is necessary under Section 5(2) of the Act shall include whether the information which is considered necessary to acquire could reasonably be acquired by other means.
4. The interception required under Section 5(2) of the Act shall be the interception of such communications as are sent to or from one or more addresses, specified in the order, being an address or addresses likely to be used for the transmission of communications to or from, from one particular person specified or described in the order or one particular set of premises specified or described in the order.
5. The order under Section 5(2) of the Act shall, unless renewed, cease to have effect at the end of the period of two months from the date

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of issue. The authority which issued the order may, at any time before the end of two-month period renew the order if it considers that it is necessary to continue the order in terms of Section 5(2) of the Act. The total period for the operation of the order shall not exceed six months. a

6. The authority which issued the order shall maintain the following records:

- (a) the intercepted communications,
- (b) the extent to which the material is disclosed, b
- (c) the number of persons and their identity to whom any of the material is disclosed,
- (d) the extent to which the material is copied, and
- (e) the number of copies made of any of the material.

7. The use of the intercepted material shall be limited to the minimum that is necessary in terms of Section 5(2) of the Act. c

8. Each copy made of any of the intercepted material shall be destroyed as soon as its retention is no longer necessary in terms of Section 5(2) of the Act.

9. There shall be a Review Committee consisting of Cabinet Secretary, the Law Secretary and the Secretary, Telecommunication at the level of the Central Government. The Review Committee at the State level shall consist of Chief Secretary, Law Secretary and another member, other than the Home Secretary, appointed by the State Government. d

(a) The Committee shall on its own, within two months of the passing of the order by the authority concerned, investigate whether there is or has been a relevant order under Section 5(2) of the Act. Where there is or has been an order, whether there has been any contravention of the provisions of Section 5(2) of the Act. e

(b) If on an investigation the Committee concludes that there has been a contravention of the provisions of Section 5(2) of the Act, it shall set aside the order under scrutiny of the Committee. It shall further direct the destruction of the copies of the intercepted material. f

(c) If on investigation, the Committee comes to the conclusion that there has been no contravention of the provisions of Section 5(2) of the Act, it shall record the finding to that effect. g

36. The writ petition is disposed of. No costs.

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(BEFORE SYED SHAH MOHAMMED QUADRI AND S.N. PHUKAN, JJ.)

STATE OF W.B. AND OTHERS

Appellants; ^a

Versus

VISHNUNARAYAN & ASSOCIATES (P) LTD.

AND ANOTHER

Respondents.

Civil Appeals No. 6899 of 1999[†] with Nos. 6900, 6902-04, 6901, 6905-12
of 1999, decided on March 19, 2002

A. W.B. Great Eastern Hotel (Acquisition of Undertaking) Act, 1980 (27 of 1980) — Ss. 4(8), (7), (1) and (2) and 3 — Steps as may be considered necessary for taking possession from persons in possession, custody or control of any part of the undertaking — Held, such steps do not include the use of force — State can only resume possession in due course of law — Therefore legal steps under the Act would mean action under any relevant law, not the use of police power — Respondents, tenants of erstwhile owners of the hotel in possession of shops, offices and godowns, were given oral notice and were dispossessed with police help on the following day — Held, High Court rightly allowed the writ petitions of respondents — Opportunity to show cause had been wrongly denied — W.B. Great Eastern Hotel (Taking Over of Management) Act, 1975 (32 of 1975), S. 3 — Constitution of India, Art. 300-A — Notice — Oral notice to dispossess or terminate possession upon acquisition of the property by Govt. — Administrative Law — Natural justice — Audi alteram partem ^b

B. Administrative Law — Administrative action — Administrative or executive function — Compliance with Constitution and statutory provisions — Held, State and its executive officers cannot interfere with the rights of others except where their actions are authorised by a specific provision of law ^c

C. W.B. Great Eastern Hotel (Acquisition of Undertaking) Act, 1980 (27 of 1980) — Ss. 4(1) and (2) — No automatic termination of tenancy existing before acquisition — Vesting of undertaking in State free from any trust, obligation, mortgage, charge, lien etc. and deemed termination of contracts, held, would not mean that landlord-tenant relationship between erstwhile owners and their tenants (respondents) had been automatically ended — Rights and obligations arising from such relationship, held, would be governed by TPA or rent control law in force ^d

D. Administrative Law — Administrative action — Administrative or executive function — Public interest/Public purpose — Held, there was no element of public purpose or interest in the present venture as it is a purely commercial one aimed at ensuring better facilities in an expensive and exclusive hotel, meant for occupation and use by affluent sections of society (Great Eastern Hotel, Calcutta) — Interpretation of Statutes — Internal aids — Preamble — Relied on ^e

E. Public Premises — Generally — Dispossession — Statutory provisions regarding, where State has acquired property — Held, action that may be taken by State does not include use of force or police power ^f

[†] From the Judgment and Order dated 14-10-1999 of the Calcutta High Court in WP No. 1466 of 1997 ^g

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- P. Public Premises — W.B. Govt. Premises (Tenancy Regulation) Act, 1976 (19 of 1976) — S. 6-A — Eviction of unauthorised occupants — Held, S. 6-A is not applicable to tenants in lawful occupation — Question whether Act applies only to residential premises, not decided**

The respondents were tenants of shops, offices and godowns in Great Eastern Hotel, Calcutta under the Company which owned it prior to its takeover by the Govt. of W.B. The management of the hotel was taken over under the Great Eastern Hotel (Taking Over of Management) Act, 1975. Then under the Great Eastern Hotel (Acquisition of Undertaking) Act, 1980 the hotel undertaking itself was taken over and transferred to the "Hotel Authority" set up under Section 5 of the Act. On 12-12-1994 the Hotel Authority, under instructions from the State Govt. issued a circular to various persons in occupation of parts of the hotel, directing them to establish what right they had to remain in occupation. There was no response. As the occupants failed to deliver possession, on 28-6-1997 govt. representatives went to the hotel and gave oral notice that they had to deliver possession and clearly stated that if possession was not delivered, it would be taken over forcibly. On 29-6-1997 the State Govt. removed the occupants, including the respondents, and took possession with the help of the police.

The respondents filed writ petitions before the High Court against their dispossession by force; they contended that they were lawful tenants who were given the premises on rent by the previous owners; that even after coming into force of the 1980 Act, the Govt. had accepted rent from them; that there had been no lawful termination of their tenancy; that in any case their forcible eviction with police help was illegal and also in violation of the principles of natural justice, as they had not been given an opportunity of showing cause against their eviction.

For the State it was submitted that (i) the tenancy of the respondents stood terminated as a result of the 1980 Act; (ii) that the respondents were legally bound to hand over possession of the suit premises and if they did not, the State was entitled to evict them by force under the W.B. Govt. Premises (Tenancy Regulation) Act, 1976; and (iii) as the Govt. required the premises for a public purpose, force could be used to evict the respondents.

The High Court allowed the writ petitions of the respondents, expressly holding that use of force could not be justified under the 1980 Act.

Before the Supreme Court on behalf of the State the same submissions as before the High Court were elaborated. It was also contended that as land and buildings had not been transferred under the 1980 Act to the Hotel Authority, the State would not be liable for actions of the Authority in relation to the respondents.

Dismissing the State's appeal, the Supreme Court

Held :

The State or its executive officers cannot interfere with the rights of others unless they can point to some specific provision of law, which authorises their acts. (Para 10)

Bishan Das v. State of Punjab, AIR 1961 SC 1570 : (1962) 2 SCR 69; *State of U.P. v. Maharaja Dharnander Prasad Singh*, (1989) 2 SCC 505, *relied on*

It is not disputed that there was a relationship of landlord and tenant between the erstwhile Company and the respondents. The rights and obligations of the landlord and tenant would be governed either by the Transfer of Property Act or

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by rent law in force and the tenancy of the demised premises could be terminated by taking action under the provisions of either of these two Acts and possession thereof could be recovered in accordance with law. Though under sub-section (1) of Section 4 of the Act of 1980, the undertaking vested in the State Government free from any trust, obligation, mortgage, charge, lien and all other encumbrances, it is not possible to agree that under the said sub-section (1) the relationship of landlord and tenant in the case in hand was put to an end inasmuch as the tenancy could not be treated as trust, obligation, mortgage and change etc. as stated in the said sub-section. In regard to sub-section (2) which provides that any "contract" in relation to the undertaking shall be deemed to have terminated on the appointed day, on the same analogy, it is held that this deeming provision does not relate to the relationship of landlord and tenant which could not be said to have come to an end. Consequently it is held that even after taking over the undertaking by virtue of the Act of 1980, the relationship of landlord and tenant continued and in place of the erstwhile Company, the State Government stepped into the shoes of the landlord. (Para 15)

The management of the hotel was handed over to the Hotel Authority. The said Authority also accepted rents from the respondents and on 12-12-1994 on a direction by the State Government, the said Authority issued a circular to the respondents asking them to establish their rights, if any. It is not possible to accept the contention that as there was no transfer of lands and buildings to the Hotel Authority, the acceptance of rent by the said Authority would not bind the Government. The Authority acted on behalf of the Government, both while accepting rent and also issuing notices to the respondents. The premises in question are located within the hotel premises and on handing over the management to the Authority, it acted on behalf of the Government. (Para 16)

Under Section 4(8) of the Great Eastern Hotel (Acquisition of Undertaking) Act, 1980 such steps as may be considered necessary, may be taken for securing possession. However, it is held that such steps cannot and would not include use of force. As laid down by this Court in *Bishan Das and Maharaja Dharmmander Prasad Singh cases* possession can be resumed by the State Government only in a manner known to or recognised by law and it cannot resume possession otherwise than in due course of law. In view of the ratio laid down in the aforementioned cases, such legal steps would mean action by the State Government under any relevant law for obtaining possession and not by using police power. However, no opinion is being expressed on the question whether such steps may include action under the W.B. Govt. Premises (Tenancy Regulation) Act, 1976 or any other law in force in the State of West Bengal. It is held that the action of the appellants by removing the respondents from the premises in question with the help of police is destructive of the basic principle of rule of law. (Para 17)

Bishan Das v. State of Punjab, AIR 1961 SC 1570 : (1962) 2 SCR 69; *State of U.P. v. Maharaja Dharmmander Prasad Singh*, (1989) 2 SCC 505, relied on

By the long title the legislature made it clear that Great Eastern Hotel was acquired by the Act of 1980 for the purpose of ensuring better facilities for boarding and lodging to the members of the public and for matters connected therewith. The hotel, which is a star hotel is meant for use by the affluent section of the society and not for the general public. The term "members of the public" would mean occupants of the hotel, who can use the hotel on payment and not general public. Therefore, this is purely a commercial venture and there was no element of public purpose or public interest. (Para 19)

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a In the absence of specific statutory provision no person can be evicted by force by the State or its executive officers, on the ground of public interest, without following due course of law. In view of the ratio laid down in *Bishan Das* and *Maharaja Dharmander Prasad Singh* it is held that an action of eviction by force cannot be justified in law and for taking possession action has to be taken in accordance with the law. (Para 20)

Bishan Das v. State of Punjab, AIR 1961 SC 1570 : (1962) 2 SCR 69; *State of U.P. v. Maharaja Dharmander Prasad Singh*, (1989) 2 SCC 505, *relied on*

b It is not possible to accept the contention that the respondents had sufficient notice inasmuch as direction was given to vacate the premises in question without any opportunity to show cause. (Para 21)

c Section 6-A of the W.B. Govt. Premises (Tenancy Regulation) Act, 1976 can be invoked against any person, who is not a tenant or who remains in occupation of any government premises without written order of the prescribed authority. The respondents were tenants under the erstwhile Company and continued to be so. Therefore, they cannot be evicted by invoking powers conferred on the authority under Section 6-A of the Act of 1976. However, the controversy as to whether this Act would apply only to residential premises, as held by the High Court is not being decided in the present case. (Para 23)

It is therefore held that the action of the State Government cannot be justified in law and accordingly the impugned judgment of the High Court is upheld. (Para 24)

d A-M/25485/C

Advocates who appeared in this case :

Mukul Rohatgi, Additional Solicitor-General, V.R. Reddy and Tapas Ray, Senior Advocates (Ms Neelam Sharma, Ajay Sharma, T.C. Sharma, K.V. Viswanathan, Ms Shruti Chaudhri, Suman J. Khaitan, Gaurav Jain, Ms Abha Jain, P. Agarwal, L.C. Agrawala, C. Mukund, Ashok K. Jain, B.K. Jain, R.K. Jain, Vibhu Bhakaru and P.N. Puri, Advocates, with them) for the appearing parties.

<i>e</i> Chronological list of cases cited	on page(s)
1. (1989) 2 SCC 505, <i>State of U.P. v. Maharaja Dharmander Prasad Singh</i>	141a, 143d, 144a-b
2. AIR 1961 SC 1570 : (1962) 2 SCR 69, <i>Bishan Das v. State of Punjab</i>	140g, 143b, 144a-b

The Judgment of the Court was delivered by

f PHUKAN, J.— These appeals by special leave arise from the judgment of the Division Bench of the Calcutta High Court by which a batch of writ petitions filed under Article 226 of the Constitution was disposed of. By this judgment we dispose of all these appeals.

2. The undisputed facts are as follows:

g The management of the undertaking of the Company, namely, Great Eastern Hotel Ltd. was taken over by the State Government by invoking the provisions of the Great Eastern Hotel (Taking Over of Management) Act, 1975. Subsequently, by the Great Eastern Hotel (Acquisition of Undertaking) Act, 1980 (for short "the Act of 1980"), the undertaking of the Company i.e. Great Eastern Hotel was taken over by the Government. The Government transferred the undertaking of the Company to the Great Eastern Hotel Authority (for short "the Hotel Authority"), which was set up under Section 5 of the Act of 1980 except the lands and the building. On 12-12-1994, according to the direction of the State Government, the Great Eastern Hotel

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Authority issued a circular to various occupants of the premises of the hotel giving them an opportunity to establish if they had any right to remain in occupation but there was no response. On 28-6-1997, as the occupants failed to deliver possession, the representative of the Government went to the hotel premises and gave oral notice to the occupants to deliver possession. They were also informed that possession if not delivered, would be taken over by force. On 29-6-1997 the State Government removed the occupants from the hotel premises and took possession with the help of police.

3. Some of the occupants of the hotel who were evicted by use of force are respondents in all these appeals. It is the undisputed case of the parties that the respondents were tenants of shops, offices and godowns in the hotel under the erstwhile Company and were in occupation of their respective portions. The respondents filed writ petitions before the High Court challenging the action of the Government in dispossessing them by force and prayed for restoration of possession claiming that they were lawful tenants having been inducted by the previous owners and even after coming into force of the Act of 1980, the Hotel Authority had dealt with them as tenants by accepting rent and that there was no lawful termination of their tenancy. It was also pleaded that such action of eviction by force with the help of police resorted to by the appellants lacked legal authority and was illegal, further, it was also in violation of the principles of natural justice as the respondents were not given an opportunity of showing cause against their eviction.

4. On behalf of the appellant-State, writ petitions were resisted before the High Court, *inter alia*, on the following grounds:

(1) that the tenancy of the respondents stood automatically terminated under the Act of 1980, and

(2) that under the provisions of the said Act they were legally bound to deliver possession of the suit premises to the State Government and on their failure to do so, they could be evicted by force by invoking the provisions of the West Bengal Government Premises (Tenancy Regulation) Act, 1976 (hereinafter referred to as "the Act of 1976").

5. It was also pleaded that as the suit premises were required for public purpose, so the Government could resort to use of force for evicting the respondents.

6. To appreciate the contention raised before us, it would be necessary to extract the definition of the expression "undertaking" in clause (f) of Section 2, Sections 3 and 4 of the Act of 1980:

"2. Definitions.—In this Act, unless the context otherwise requires,—

(a)-(e) * * *

(f) 'undertaking of the Company' means the properties, both movable and immovable, cash balances, reserve funds and other assets of the Company including lands, buildings, machineries, plants, furniture, equipments, stores and any other property which may be in the ownership, possession, custody or control of the Company in relation to its undertaking immediately before the appointed day and all books of

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accounts, registers and other documents of whatever nature relating thereto.

a 3. *Acquisition of the undertaking of the Company.*—(1) On and from the appointed day, the undertaking of the Company shall, by virtue of this Act, stand transferred to, and vest absolutely in the State Government.

b (2) Upon the vesting of the undertaking of the Company in the State Government under sub-section (1), the State Government may, for efficient management and administration thereof, provide by notification for the transfer of the undertaking of the Company (save the lands and buildings forming part thereof) to, and vesting thereof in, the Hotel Authority with effect from such date as may be specified in the notification.

c (3) The State Government may allow the lands and buildings mentioned in sub-section (2) to be used by the Hotel Authority for the purpose of giving effect to this Act on such terms and conditions as may be provided by notification with effect from the date of issue of the notification under sub-section (2).

d 4. *General effect of vesting.*—(1) The undertaking of the Company which has vested in the State Government under sub-section (1) of Section 3 shall, by force of such vesting, be freed and discharged from any trust, obligation, mortgage, charge, lien and all other encumbrances affecting it, and any attachment, injunction or decree or order of any court or tribunal restricting the use of the whole or any part of the undertaking of the Company in any manner shall be deemed to have been withdrawn.

(2) Any contract, whether express or implied, or other arrangement, whether under any statute or otherwise, insofar as it relates to the affairs of the Company in relation to its undertaking and in force immediately before the appointed day shall be deemed to have terminated on the appointed day.

e (3) Where any licence or other instrument in relation to the undertaking of the Company had been granted at any time before the appointed day to the Company by the Central Government or the State Government or any other authority, the State Government shall, on and from the appointed day, be deemed to be substituted in such licence or other instrument in place of the Company referred to therein as if such licence or other instrument had been granted to it.

f (4) On and from the date of transfer of the undertaking of the Company to, and vesting thereof in, the Hotel Authority, that authority shall be deemed to be substituted in the licence or other instrument referred to in sub-section (3) in place of the State Government as if such licence or other instrument had been granted to the Hotel Authority.

g (5) Any liability incurred by the Company (including the liability, if any, arising in respect of any loans or amounts advanced by the State Government to the Company together with interest thereon) after the management of the undertaking of the Company had been taken over by the State Government shall, on and from the appointed day, be the liability of the State Government and shall, on and from the date specified in the notification under sub-section (2) of Section 3, stand transferred to, and shall vest in the Hotel Authority.

h (6) If, on the appointed day, any suit, appeal or other proceeding of whatever nature in relation to any matter or business in respect of the

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undertaking of the Company, instituted or preferred by or against the Company, is pending, the same shall not abate, be discontinued or be, in any way, prejudicially affected by reason of the transfer of the undertaking of the Company or of anything contained in this Act and the suit, appeal or other proceeding may be continued, proceeded with and enforced by or against the State Government and on and from the date specified in the notification under sub-section (2) of Section 3, the Hotel Authority. a

(7) Any person in possession or custody or control of the whole or any part of the undertaking of the Company on the date immediately before the appointed day shall, on the appointed day, deliver the possession of such undertaking of the Company or part thereof to the State Government or to such person as may be specified by the State Government in this behalf. b

(8) The State Government may take, or cause to be taken, such steps as it considers necessary for securing the possession of the undertaking of the Company which has vested in the State Government under sub-section (1) of Section 3." (emphasis supplied) c

7. The High Court rejected the contention that the eviction of the respondents was carried out for a public purpose as the respondents were dispossessed for improvement of the hotel, which was purely a commercial venture and, therefore, there was no element of public interest. The High Court also held that the Act of 1980 does not provide for use of force for eviction of tenants from the hotel premises and this Act is a self-contained one. According to the High Court, the Act of 1976 applies in respect of only residential properties of the Government and cannot be used for eviction of the respondents by force as the premises were used for non-residential purpose. d

8. We have heard Mr Mukul Rohatgi, learned Additional Solicitor-General appearing for the State of West Bengal, Mr Viswanathan, learned counsel for the respondents in all the appeals except Civil Appeal No. 6910 of 1999 and for this appeal learned counsel Mr Mukund made his submission. e

9. The question, which needs our consideration is whether the action of the State Government in taking possession of the suit premises by using force was lawful. f

10. It is the settled position of law that the State or its executive officers cannot interfere with the rights of others unless they can point to some specific provision of law, which authorises their acts. A Constitution Bench of this Court in *Bishan Das v. State of Punjab*¹ held that the State or its executive officers did not have any right to take law into their own hands and remove a person by an executive order. The Court further observed: (SCR p. 80) g

"Before we part with this case, we feel it our duty to say that executive action taken in this case by the State and its officers is destructive of the basic principle of the rule of law." h

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11. In *State of U.P. v. Maharaja Dharmender Prasad Singh*² an apprehension was raised by the learned counsel that if the State Government, on the self-assumed and self-assessed validity of its own action of cancellation of the lease, attempts at and succeeds in, a resumption of possession extrajudicially by force, it would cause great hardship and injustice. The Court held that possession can be resumed by the Government only in a manner known to or recognised by law and it cannot resume possession otherwise than in due course of law and, therefore, prohibited the Government from taking possession otherwise than in due course of law.

12. Now let us consider whether the Act of 1980 authorises the State Government to use police power for eviction of the respondents. Sub-sections (1) and (2) of Section 3 and sub-sections (1), (2), (7) and (8) of Section 4 of the Act of 1980 are relevant for the present purpose. Sub-section (1) of Section 3 of the Act of 1980 provides that the undertaking of the Company shall stand transferred to and vested absolutely in the State Government on the appointed day. From the definition of the undertaking as contained in clause (f) of Section 2 of the Act of 1980, the undertaking of the Company also includes lands, buildings, etc. By sub-section (2) of Section 3, the State Government may for reasons stated in the said sub-section transfer the undertaking of the Company to the Hotel Authority except the lands and buildings forming part thereof. Clause (a) of sub-section (2) defines "appointed day" to mean the date on which the Act came into force. Therefore, on the date the notification under sub-section (1) of Section 3 of the Act of 1980 was issued, the undertaking land and buildings vested in the State Government absolutely. Sub-section (1) of Section 4 provides that the undertaking which vested in the State Government shall be freed and discharged from any trust, obligation, mortgage, change, lien and all other encumbrances affecting it. We are not concerned with the second part of the said sub-section which relates to any attachment, injunction or decree or order passed by any court or tribunal. According to sub-section (2) of Section 4, any contract, whether express or implied, or other arrangement, whether under any statute or otherwise, insofar as it relates to the affairs of the erstwhile Company in relation to the undertaking and in force immediately before the appointed day shall be deemed to have terminated on the date of vesting. Under sub-section (7) of Section 4 any person in possession or custody or control of the whole or any part of the undertaking on the date immediately before the appointed day shall deliver the possession of such undertaking of the Company or part thereof to the State Government or to such person as may be specified by the State Government in this behalf. Sub-section (8) of Section 4 empowers the State Government to take or cause to be taken such steps as it considers necessary for securing the possession of the undertaking of the Company which vested in the State Government under sub-section (1) of Section 3. By a notification issued under sub-section (2) of Section 3, the State Government for efficient management and administration, transferred the undertaking (save lands and buildings) to the Hotel Authority constituted under Section 5 of the Act of 1980.

13. Mr Mukul Rohatgi, learned Additional Solicitor-General has submitted that as there was no transfer of the lands and buildings to the Hotel Authority, in view of the specific bar in sub-section (2) of Section 3 of the Act of 1980, any action of the Hotel Authority vis-à-vis the respondents would not be binding on the Government. We shall deal with this submission at a subsequent stage. a

14. Mr Mukul Rohatgi, learned Additional Solicitor-General has further submitted that as in terms of sub-section (1) of Section 3 of the Act of 1980, the vesting of undertaking absolutely was complete on the appointed day and on such vesting it be freed and discharged from any trust, obligation, mortgage, charge, lien and all other encumbrances affecting it, the tenancy between the respondents and the erstwhile Company came to an end. It was further submitted that the word "contract" occurring in sub-section (2) includes tenancy right and by virtue of the said sub-section (2), the tenancy between the respondents and the erstwhile Company came to an end. According to the learned Additional Solicitor-General as the tenancy had come to an end, the respondents were in default of their legal liability to hand over the possession of the premises in question as per sub-section (7) of Section 4 of the Act of 1980 so the State Government by invoking the provision of sub-section (8) of the said section could take such steps as it considered necessary for securing possession and such steps would include eviction by force. b
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15. It is not disputed that there was a relationship of landlord and tenant between the erstwhile Company and the respondents. The rights and obligations of the landlord and tenant would be governed either by the Transfer of Property Act or by the rent law in force and the tenancy of the demised premises could be terminated by taking action under the provisions of either of these two Acts and possession thereof could be recovered in accordance with law. Though under sub-section (1) of Section 4 of the Act of 1980, the undertaking vested in the State Government free from any trust, obligation, mortgage, charge, lien and all other encumbrances, we are unable to agree with the learned Additional Solicitor-General that under the said sub-section (1) the relationship of landlord and tenant in the case in hand was put to an end inasmuch as the tenancy could not be treated as trust, obligation, mortgage and charge etc. as stated in the said sub-section. In regard to sub-section (2) which provides that any "contract" in relation to the undertaking shall be deemed to have terminated on the appointed day, on the same analogy, we hold that this deeming provision does not relate to the relationship of landlord and tenant which could not be said to have come to an end. Consequently, we find no force in the submission of Mr Mukul Rohatgi and we hold that even after taking over the undertaking by virtue of the Act of 1980, the relationship of landlord and tenant continued and in place of the erstwhile Company, the State Government stepped into the shoes of the landlord. e
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16. The management of the hotel was handed over to the Hotel Authority. The said Authority also accepted rents from the respondents and on 12-12-1994 on a direction by the State Government, the said Authority issued h

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a a circular to the respondents asking them to establish their rights, if any. As mentioned earlier, Mr Mukul Rohatgi has submitted that as there was no transfer of lands and buildings to the Hotel Authority, the acceptance of rent by the said Authority would not bind the Government. We are unable to accept the contention as in our opinion the Authority acted on behalf of the Government, both while accepting rent and also issuing notices to the respondents. The premises in question are located within the hotel premises and on handing over the management to the Authority, it acted on behalf of the Government.

b 17. Let us examine the scope and ambit of sub-sections (7) and (8) of Section 4 of the Act of 1980 assuming that the tenancy came to an end as urged by Mr Mukul Rohatgi. Under sub-section (7) any person in possession or custody or control of the whole or any part of the undertaking of the Company before the appointed day, shall deliver such possession to the State Government or any person as may be specified by the State Government and in view of this statutory obligation, the respondents were bound under the law to hand over the possession and on failure to do so, the State Government could take steps for securing possession by use of force. Under sub-section (8) of Section 4 of the Act of 1980, such steps as may be considered necessary, may be taken for securing possession. In our considered view such steps cannot and would not include use of force. As laid down by this Court in *Bishan Das*¹ and *Maharaja Dharmander Prasad Singh*² possession can be resumed by the State Government only in a manner known to or recognised by law and it cannot resume possession otherwise than in due course of law. In view of the ratio laid down in the aforementioned case, such legal steps would mean action by the State Government under any relevant law for obtaining possession and not by using police power. We make it clear that we are not expressing any opinion whether such steps may include action under the Act of 1976 or any other law in force in the State of West Bengal. We are of the opinion that the action of the appellants by removing the respondents from the premises in question with the help of police is destructive of the basic principle of rule of law.

f 18. Mr Mukul Rohatgi has further tried to defend the action of the appellants on the ground of public interest. We may quote below the long title of the Act of 1980 which runs as follows:

"Whereas it is expedient to provide for the acquisition of the undertaking of Great Eastern Hotel Limited for the purpose of ensuring better facilities for board and lodging to the members of the public and for matters connected therewith or incidental thereto."

g 19. By the long title the legislature made it clear that Great Eastern Hotel was acquired by the Act of 1980 for purpose of ensuring better facilities for boarding and lodging to the members of the public and for matters connected therewith. As held by the High Court the hotel, which is a star hotel is meant for use by the affluent section of the society and not for general public. The term "members of the public" would mean occupants of the hotel, who can use the hotel on payment and not general public. Therefore, this is purely a

commercial venture and there was no element of public purpose or public interest. Therefore, the contention of Mr Rohatgi is rejected.

20. In the absence of specific statutory provision can a person, on the ground of public interest, be evicted by force by the State or its executive officers without following due course of law? In view of the ratio laid down in *Bishan Das*¹ and *Maharaja Dharmender Prasad Singh*² we hold that such an action of eviction by force cannot be justified in law and for taking possession, action has to be taken in accordance with the law.

21. A stand has been taken by Mr Rohatgi that powers given to the Government and its officials by sub-section (8) of Section 4 of the Act of 1980 is akin to Section 47 of the Land Acquisition Act of 1894. Under Section 16, the Collector can take possession after the award is made and under Section 17, possession can be taken after notice under sub-section (1) of Section 9 of the Act of 1980 is issued. For taking the possession of the land from the landowner, in our view Section 47 cannot be invoked. As on 28-6-1997, the representative of the Government gave oral notice to the respondents to deliver possession, Mr Mukul Rohatgi has contended that the respondents had sufficient notice. We are unable to accept the contention inasmuch as direction was given to vacate the premises in question without any opportunity to show cause.

22. Lastly, it was contended by Mr Mukul Rohatgi that as the respondents were trespassers, the Government could evict them by invoking Section 6-A of the Act of 1976. The said sub-section runs as follows:

"6-A. *Eviction of unauthorised occupants and penalty for such occupation.*—Where any person, not being a tenant, occupies, or remains in occupation of, any government premises without the written order of the prescribed authority,—

(a) the prescribed authority, or any officer authorised by it in this behalf, may take such steps and use such force as may be necessary to take possession of the premises and may also enter into the premises for the said purpose; and

(b) such person shall be punishable with imprisonment for a term which may extend to six months, or with fine which may extend to one thousand rupees, or with both."

23. Section 6-A can be invoked against any person, who is not a tenant or who remains in occupation of any government premises without written order of the prescribed authority. The respondents were tenants under the erstwhile Company and continued to be so, as held by us. Therefore, they cannot be evicted by invoking powers conferred on the authority under Section 6-A of the Act of 1976. However, we are not deciding the controversy as to whether this Act would apply only to residential premises, as held by the High Court.

24. For what has been stated above, we hold that the action of the State Government cannot be justified in law and accordingly we uphold the impugned judgment of the High Court. In the result the appeals are dismissed. Cost on the parties.